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IN THE

Supreme Court of the United States

No. 913

October Term, 1962

WILLIAM J. BANMILLER, Warden
Eastern State Penitentiary of Pennsylvania,
Petitioner

v.

ANTHONY SCOLERI,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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William J. Banmiller, Warden of the Eastern State Penitentiary of Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 10, 1962; petition for rehearing denied December 11, 1962.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Pennsylvania has been reported at 198 F. Supp. 872. It appears herein as Appendix B, p. 62.

The opinion of the Court of Appeals for the Third Circuit, together with the dissenting opinions of Circuit Judge Kalodner, joined in by Circuit Judge Staley, and of Circuit

Judge Hastie, has been reported at 310 F. 2d 720. It appears here as Appendix B, p. 30. Appended to the report, 310 F. 2d at 736, is the per curiam opinion of the Court of Appeals, denying the Petition for Rehearing. It appears here as Appendix B, p. 59.

The opinion of the Supreme Court of Pennsylvania, affirming the verdict of guilty of murder in the first degree returned with the penalty fixed at death, claimed to have resulted from a denial to the respondent herein of his constitutional rights of due process of law, is reported in 399 Pa. 110, together with dissenting opinions. Certiorari denied, 364 U.S. 849.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered and opinion filed on October 10, 1962. Petition for rehearing, timely filed, was denied and opinion filed December 11, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 19(1, b).

QUESTIONS PRESENTED

I. Did the Court of Appeals for the Third Circuit improperly invade the right of Pennsylvania to formulate and administer its domestic law for the prosecution of crime by setting aside a ruling of the highest Court of that State through habeas corpus, and denouncing, as so fundamentally unjust as to cause the trial court to lose jurisdiction, a procedure of introducing as part of the Commonwealth's case in chief evidence of prior unrelated crimes of defendant, a procedure which had been upheld ever since imprisonment for life was introduced as an alternative to the death penalty, in the Supreme Court of Pennsylvania and the Court of Appeals for the Third Circuit, and which this Court had declined to consider on certiorari in at least ten cases?

II. Did respondent waive his right to complain against the introduction, over objection, during the Commonwealth's case in chief, of evidence of defendant's prior unrelated crimes of violence, by taking the stand (which would have permitted the Commonwealth to introduce the same evidence in rebuttal to attack his credibility) and not only admitting those crimes, but endeavoring to turn them to his advantage?

III. Did the death before final disposition of the case of Judge Goodrich, who had sat as a member of the Court in banc, and had, at post-trial conference, voted to sustain the judgment of the District Court in denying the petition for writ of habeas corpus, thus breaking a four to four stand-off, deprive the thus diminished court of jurisdiction to render judgment in the case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fourteenth Amendment to the Constitution of the United States, Section 1: ". . . nor shall any state deprive any person of life . . . without due process of law."

II. The Act of the General Assembly of the Commonwealth of Pennsylvania, approved May 14, 1925, P. L. 759, as re-enacted in the Criminal Code of Pennsylvania, the Act of June 24, 1939, 872, Section 701 (Section 701 is printed as Appendix "A," page 29, infra).

STATEMENT OF THE CASE

On August 28, 1958, at approximately 8:40 p.m., two men, armed and wearing stocking masks over their faces, entered the small, corner "notions" store conducted in South Philadelphia by Max Gordon, an elderly man. (P-1, pp. 57, 58, 65.) (P-1 designates the typewritten transcript of the notes of trial testimony, rulings and charge in the Court of Over and Terminer of Philadelphia, which was offered in evidence at the hearing in the United States District Court for the Eastern District of Pennsylvania, at page 21 of the

typewritten transcript of those proceedings, which have been certified in this proceeding.)

Besides Max Gordon and his wife, there were present their daughter Sheila, aged seventeen years, and a friend, Jack Dinerman. All were robbed; money was taken from the cash register. (P-1, pp. 66, 88, 152.) During the course of the robbery, gunfire opened. Jack Dinerman saw respondent in a squatting position, firing his gun in the direction of a counter behind which was Max Gordon. (P-1, pp. 90, 91, 93). Sheila also saw respondent aiming in the direction of the same counter. (P-1, pp. 150, 151.)

Max Gordon was shot three times and as a result of his wounds died two hours later. (P-1, p. 47.) One of the robbers was fatally wounded through a shot fired by Max Gordon.

Other witnesses identified respondent as he fled from the scene. (P-1, pp. 184, 234-5, 261-2, 264.).

Respondent was captured in Kansas City, Missouri, September 19, 1958, armed.

The judgment of the Supreme Court of Pennsylvania, upholding the judgment of sentence of death of the Court of Oyer and Terminer is reported at 399 Pa. 110.

The basis for the ruling of the Court of Appeals is the introduction by the Commonwealth in its case in chief of defendant's prior convictions of, or pleas to, a large number of unrelated crimes of violence.

The indication that respondent was a former convict first appears at P-1, p. 489, where a Commonwealth witness, one Febo, stated that he had been sentenced with respondent at the same time for many of these crimes. The Court sustained objection but refused to grant a motion for mistrial. The Court found no prejudicial error had been committed. (P-1, p. 492.)

Next the prosecutor indicated that he was about to offer the record of respondent's prior unrelated crimes in accordance with the so-called Parker Rule, to be used by the jury, only when and if they had completed that part of their verdict deciding guilt and degree of guilt, and had decided upon guilt of murder in the first degree. Then and

then only might the jury advert to the history of crime and afford it such weight as they decided with respect to their choice of penalty as between death or life imprisonment. Counsel for respondent stated to the Court that he intended to request the Court to inaugurate in this case the so-called Split-Verdict procedure. The Court rejected this, saying that it could not be done, that it was a matter for the Legislature. (P-1, p. 194.)

The formal offer, out of the presence of the jury, of respondent's prior record appears at P-1, p. 614. Defense counsel objected, pointing out that this would be highly prejudicial since the evidence of defendant's guilt was overwhelming. (P-1, p. 618.) At this conference, counsel for respondent made his only reference to due process in these words, speaking of the Parker Rule: (P-1, p. 622)

> "I think it has always been a denial of due process to do that. They do not do it in the Federal Courts."

In Court again, a bare objection was made, and the Court explained to the jury at length the restrictive or postponed use of the testimony they were about to hear. (P-1, pp. 622-625.)

The defense introduced testimony, which appears starting at P-1, p. 652 and concluding at P-1, p. 780, where the transcript reports the Commonwealth's rebuttal testimony, continuing to P-1, p. 972. In his defense, respondent produced testimony concerning his criminal past which petitioner claims constituted a waiver of any objections he claimed when his record was introduced. This is treated in petitioner's second question presented.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

Federal jurisdiction in the court of first instance. The United States District Court for the Eastern District of Pennsylvania arose from the provisions of 28 U.S.C. 2241 (3).

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE COURT OF APPEALS BELOW IMPROPERLY SET ASIDE THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA, AND DECIDED THE MATTER IN A MANNER NOT CONSISTENT WITH ITS OWN RULING IN THE CASE OF *United States ex rel. Herman Rucker v. David M. Myers.*

The decision of the Court of Appeals in the instant case is a direct overruling of the judgment of the Supreme Court of Pennsylvania, the Court of last resort in that State, 399 Pa. 110, certiorari denied, 364 U. S. 849 (1960).

There is no need here to enter into a review of the progress of incursions by the federal courts into the State's prerogatives in administering criminal justice. Mr. Justice Jackson covered the field in his concurring opinion in *Brown v. Allen*, 344 U. S. 443, 73 S. Ct. 397.

There is no need to quote to this court at length from the familiar tributes to the very great respect due to the judgments of the highest Court of the State in exercising its rights and performing its obligations in protecting all of the rights of the defendant in a criminal case, guaranteed in both the State and the Federal Constitution. *Bute v. People of Illinois*, 333 U. S. 640, 649, 675; 68 S. Ct. 763, 768, 781.

What we need to discuss here is not the ultimate rights or wrongs of the case, but whether there exists a conflict not only between the Supreme Court of Pennsylvania and the Court of Appeals for the Third Circuit, which is clear, but also whether there is a conflict within the Court of Appeals itself, as evidenced in the history of the judgments in *Scoleri* and *Rucker* (Appendix B), and in the judgments themselves, which calls for an exercise of this Court's supervision.

Petitioner asks this Court to consider whether it is not possible that the majority of the Court of Appeals hearing this case yielded unwittingly to that emotional

appeal which the Supreme Court of Pennsylvania resisted, as they noted. (399 Pa. at p. 135.) It is noteworthy that the then Chief Justice, Charles Alvin Jones, and his successor as Chief Justice, John C. Bell, who have been outspoken in favoring the split-verdict procedure, continued steadfast in their adherence to the letter of the law and upheld the judgment of the lower court in the opinion written by their fellow-member of the Supreme Court, Benjamin R. Jones.

The trial procedure now declared to be "so fundamentally unjust as to cause the trial court to lose jurisdiction," and to justify "the conclusion that Scoleri was overreached by the procedure followed at his trial is irresistible" (Appendix "B", p. 39, infra), was one which, although frequently criticized by members of the Supreme Court of Pennsylvania itself, had for thirty years remained undisturbed. The procedure stemmed from the Act of May 1, 1925, P. L. 759, which for the first time constituted life imprisonment as an alternative punishment for murder in the first degree, together with death, previously the sole penalty, and assigned to the jury the duty of fixing the penalty, providing for the return of their findings in one verdict.

This procedure has nowhere been more concisely stated than by the Court below in its opinion in the instant case, where it said: (Appendix B, p. 34, infra)

> "Under that portion of the second paragraph of Section 701 of the Criminal Code of 1939 quoted, the jury had the duty of determining the penalty when, as in Scoleri's case, they convicted a defendant of first degree murder. The precursor of the statute referred to was the Act of May 14, 1925, P. L. 759. The earlier Act need not be quoted here for, insofar as the essential elements of the instant case are concerned, its substance was the same. In respect to its effect, Judge Maris of this court, in *United States ex rel. Thompson v. Price*, 258 F. 2d at p. 921, correctly and succinctly

stated: 'The Act of 1925 was interpreted by the Supreme Court of Pennsylvania to permit the admission of evidence of prior [unrelated] convictions solely for the purpose of enabling the jury, after it has found the accused guilty of first degree murder, to know what manner of man he is and whether he is entitled to mercy when they undertake their task of deciding what penalty should be imposed upon him.' See *Commonwealth v. Parker*, 294 Pa. 144, 151-155, 143 Atl. 903, 906-907 (1928), in which Chief Justice Von Moschzisker considered the effect upon the admissibility of evidence of prior convictions under the Act of the rule of evidence that, in the trial of a defendant for a crime, evidence of other independent, unconnected offenses committed by him is not admissible to establish his guilt of the crime for which he is on trial. As Judge Maris stated, id. supra, at p. 921, 'The Chief Justice stated that since the statute required the jurors to assess the punishment and permitted them to extend mercy in a proper case by reducing the penalty to life imprisonment, the jury should be permitted to have the same sort of information that a judge considers when he decides as to the punishment for crime. But since in Pennsylvania the jurors may not render piecemeal verdicts there is no provision for separate inquiry. Hence, concluded the Chief Justice, their single verdict must include both their finding as to the defendant's guilt and their determination as to the penalty to be imposed upon him.' Chief Justice Von Moschzisker concluded that the prescribed statutory practice was a permissible and proper one."

On December 1, 1959, the procedure in Pennsylvania was changed through the passage of the so-called "Split-verdict" Act, which provided that during the trial of an indictment for murder the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty there-

for, after hearing such additional evidence as may be submitted upon that question. Under this statute evidence of prior unrelated crimes may not be placed in evidence until and unless the jury shall have found the accused guilty of murder in the first degree. The act does not prohibit the Commonwealth from exercising its right to attack the credibility of the defendant, if he take the witness stand, through evidence of prior convictions of crimes of the nature of crimen falsi, which include the crimes introduced in the case against Scoleri. (Appendix "B", p. 33, footnote 3, contains the text of the Act.) This Act was passed after the conviction of Scoleri but prior to final argument in the Supreme Court of Pennsylvania.

In the Supreme Court of Pennsylvania, Scoleri based his principal argument for relief upon his claim that during a portion of the trial he was unable to consult with his counsel or to understand the proceedings, due to secret self-infliction of drugs. This claim was made the basis for almost the entirety of the extensive testimony, heard and rejected by the District Court, and not even mentioned by the Court of Appeals. The transcript has been certified here. A lesser complaint was made against the Court's charge on the question of alibi. As to the introduction of prior convictions, the stress was laid upon argument that the Split-Verdict Act must be construed as retroactive, so as to reach the same posture which resulted from the judgment of the Court of Appeals in the instant case, retrial under the provisions of the Split-Verdict Act. (cf. Appendix "B", p. 29, infra). This argument was rejected and the Act held to be prospective only. 399 Pa. 110, 130-137.

Confronted with the opinion of the District Court, which had heard only perfunctory reference to the question of the effect of evidence of prior convictions, and had dismissed that feature on the authority of *Thompson v. Price*, *supra*, the Court of Appeals resorted to a rather unusual procedure. It limited the position taken in *Thompson v. Price* to "cases in which the defendant did not object to the admission into evidence of his prior record of unrelated

criminal convictions." (Appendix "B", p. 38, infra). In *Thompson v. Price*, the Court notes, it "held the practice not to be a violation of the standards of fundamental fairness required by the Fourteenth Amendment". (Appendix "B", p. 35, infra). We shall consider later whether a Court of Appeals for the Third Circuit maintained this position in the *Rucker* case in which also the introduction of such evidence over objection was the basis for complaint. (Note: Petitioner is advised that a petition to this Court for a writ of certiorari to the Court of Appeals for the Third Circuit will be timely filed).

This Court has not before considered the precise point. Judge Kalodner in his dissenting opinion, without trying to support his dissent by attaching significance to the denial by this Court of an application for certiorari, points out that this Court has in recent years denied applications for certiorari in ten cases from Pennsylvania, including *Scoler* and *Thompson v. Price*, *supra*, and that in only one of those cases did a Justice express an opinion that it should be granted. (Appendix "B", p. 30, infra). That was *in Commonwealth v. Rucker*, 368 U.S. 868 (1961). That case is of interest here and the opinion of the Court of Appeals appears herein Appendix C.

It should be helpful, despite the need for brevity, in our petition for certiorari to compare the two cases to determine whether their contrary conclusions do not indicate an ambivalence within the Court in the approach to the problem which of itself is persuasive of the impropriety of the Court's invasion of State territory in this particular corner, and of the need to reverse the order of the Court of Appeals that the writ of habeas corpus be granted.

It is difficult to see the propriety of asserting that the about-face of the Court of Appeals is in tardy recognition of principles so rooted in the traditions and conscience of our people as to be ranked as fundamental, when the procedure sought to be overthrown has persisted for thirty years, and has withstood constant attack. Is there any significance in the fact that the procedure is found to be in derogation

of due process at precisely the time when the Legislature of Pennsylvania has decided to adopt a split-verdict procedure? Does the order reflect an intent to make the act retroactive in such selected cases as create a feeling of injustice, rather than an objective study of the law properly applicable to the sole case under scrutiny? The Legislature did not condemn the former procedure; it did not make the act retroactive.

The Order of the Court of Appeals in Scoleri was entered October 10, 1962, and the opinion was filed the same day. The Order in Rucker was entered November 30, 1962, while a petition for reargument in Scoleri was under consideration by the Court. The Order denying rehearing in Scoleri was entered December 11, 1962, and a very interesting, if brief, Opinion was filed on the same day. (Appendix "B", p. 59, infra.) Petition for rehearing in Rucker has been denied, without the filing of an opinion.

The Court in Scoleri consisted of Biggs, Chief Judge, and Goodrich, McLaughlin, Kalodner, Staley, Hastie, Ganey and Smith, Circuit Judges. Judge Goodrich died before the opinion in the case was filed. (Appendix "B", p. 39, infra.) The opinion denying rehearing stated that for the reason that he died before the proposed opinion was circulated, Judge Goodrich did not vote (Appendix "B", p. 60, infra.) thus his expressed opinion at the conference following oral argument on the appeal, favoring a denial of the writ, was not counted. (Appendix "B", p. 55, infra, footnote 12.) The vote to reverse the Order of the District Court was thus four to three, Judges Kalodner, Staley and Hastie dissenting. This procedure is treated as Question No. 3.

In Rucker, the Court consisted of Judges McLaughlin and Hastie, Circuit Judges, and Judge Dumbauld, District Judge. Judge Hastie wrote the Opinion, sustaining denial of a writ of habeas corpus, and Judge McLaughlin dissented.

In each case a brutal murder was perpetrated in the course of a robbery following a burglarious entry with intent to rob. In each case an aged couple was victimized, in a small neighborhood store conducted by the victims.

At trial, in each case, under procedures which had been upheld in State Courts for some thirty years, and which had not been disturbed by any Federal Court, the record of the defendant's prior convictions or pleas of guilt with respect to serious unrelated crimes was offered and received in evidence, over objection, during the Commonwealth's case in chief, for the restricted use under scrutiny here, with time-honored instructions.

The Court of Appeals in Rucker had before it the same situation which confronted it in Scoleri, and so stated at page 2 of the Opinion: (Appendix "B", p. 72, infra).

> "Therefore our first inquiry is whether this case differs in any significant way from Scoleri."

It is urged by petitioner here that the attempt to reconcile the two results is unconvincing and unsuccessful. The Court in Scoleri, following the filing of the opinion in Rucker, filed an opinion denying rehearing (Appendix B,) in which it attempted likewise to distinguish the cases through the means of advancing Scoleri's weak and contradictory evidence of alibi as hampered through the evidence of prior crimes of violence. In Rucker, the court had distinguished the cases in the same way, by scoffing at any possibility that Rucker's attempts to show intoxication at the time of the crime, together with evidence that he became uncontrollably bellicose when in liquor, might have led a jury to ignore the felony-murder law raising the crime to murder in the first degree, and to fix the virtually conceded guilt at murder in the second degree.

The factual differences are found not in any variation of the nature, bestiality nor death-deserving features of the crimes, but rather from subsequent incidents which are pointed out by the Court of Appeals in the respective opinions:

1. Apprehension of Rucker and his companion took place within several hours of the crime, and in its immediate neighborhood. (Appendix "B", p. 73, infra).

Apprehension of Scoleri, his co-defendant brother, and one Ida Iocco, who shared her apartment part-time with the respondent, was accomplished after a months-long interstate flight; during this flight, Scoleri had his companion Ida Iocco dye her hair (P1, pp. 450, 556, 357), as did respondent's brother (P1, p. 451), switched cars and license plates (P1, pp. 338-443; 443, 457), ordered contact lenses to permit the discarding of eyeglasses (P1, pp. 451, 550). Thus much was testified to by respondent and his brother, as well as by Ida Iocco, who was a Commonwealth witness.

2. Rucker did not take the stand, but relied upon the testimony of witnesses that he had been drinking wine and whiskey for a considerable period before the crime; had openly discussed his contemplation of robbing someone; and had been creating a disturbance in a tap-room in the immediate neighborhood; other witnesses testified to his chronic and uncontrollable belligerency when he had been drinking. (Appendix "B", p. 74, infra).

Scoleri attempted to establish an alibi through his own testimony and the testimony of witnesses who were, as conceded by the defense, persons whose testimony must be closely scrutinized. Scoleri admitted to having failed to procure medical care for one of the robbers who had been wounded by the victim. He gave as his reason the fact that he was a paroled convict who faced some thirty years of back time. He admitted having aided his brother in disposing of the cadaver in New Jersey. (P-1, pp. 434-438, 716).

3. As Rucker did not take the stand, the Commonwealth could not have used his record of prior convictions or pleas of guilty in order to attack his credibility as a witness.

Through taking the stand, Scoleri opened the door for the introduction of his prior record for the purpose of attacking his credibility.

The justification expressed by the Circuit Court for reaching contrary decisions in the two cases appears to

rest mainly upon two factors: The nature of the effort of the defense towards mitigation (1) of the degree of guilt, or, failing that, (2) of the penalty, for a crime of which complete exculpation was not to be hoped for.

The opinion in Rucker ignores completely the unpredictable processes which motivate a jury—or a single unbudgeable juror—to stretch to the fullest extent the required charge of the Court that they and they alone decide upon the verdict. To say, as the Court of Appeals does, after quoting a portion of the trial court's charge denigrating the defendant's testimony as to intoxication: (Appendix "B", p. 75, infra)

> "Consistent with this charge, the jury could not properly have used the evidence of intoxication as a basis for finding the accused guilty of an offense less serious than first degree murder."

is to ignore the historical facts of jury verdicts. Consistency either in finding, evaluating and interpreting the facts, or in hearing, understanding, recollecting and applying the charge of the trial court, has not been the undeviating course of trial by jury. No lawyer is in practice for many months before he finds himself saying: "You never can tell what a jury will do." Any compendium of murder trials, any biography of a criminal lawyer, furnishes many verdicts of second degree murder in which the law and the uncontradicted facts shrieked out for first degree and death.

How is it possible for anyone, Court or layman, to say that, absent the knowledge of prior guilt of voluntary manslaughter and of aggravated assault, the jury might not have treated Rucker as an alcoholic, a drunken bum who, because of an unconquerable failing (now generally recognized as a disease) perhaps inherited, perhaps, as was mentioned, related to military combat experience (Appendix "B", p. 78, infra), was not to be held to full accountability? Who can say with judicial assurance no juror would have said: "Second degree—that's it as far as I'm concerned"?

There can be no denial that a verdict of murder in the second degree is frequently the result of a compromise among stubbornly opposed jurors. We must bear in mind also that no defendant may in Pennsylvania enter a plea of guilty to murder in the first degree. He may plead guilty to the crime of murder generally, but the trial court must determine whether the Commonwealth had met its burden of proving every element of first degree murder; the presumption deriving from the plea rises no higher than murder in the second degree. *Commonwealth v. Mayble*, 394 Pa. 34, 37 (1958).

The decision that, since Scoleri was making an attempt, however feeble, to exculpate himself through an alibi, which required the destruction of identification of Scoleri as a participant in the crime, and as a fugitive from the scene, that procedure which was fair in the Rucker case, and fair in hundreds of cases for the last thirty years, became suddenly basically unfair and so gravely prejudicial, as to be in conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . ." is indeed a "feat of psychological wizardry."

As an example of the quality of the alibi, see P-1, p. 661, and P-1, p. 713. In the former testimony, Joseph Scoleri testified that on the way from the robbery, with the dying Woods in the car, he came upon respondent in the street and respondent drove the car to Iocco's apartment. In the latter passage, respondent says that he was idling in the street, very close to the apartment; he saw the car drive up to the apartment, saw Joseph alight from the car and proceed to the apartment. Respondent called to his brother and was told of Woods' condition. This contradiction could have occurred only through a lapse of memory of a rehearsed story, not through misrecollection. Only Joseph Scoleri and Margaret Sbracci, brother and sister, respectively, of respondent testified to the alibi. Sbracci testified (P-1, pp. 791-812) that Scoleri was visiting her at the restaurant where she was employed, before, during,

and shortly after, the critical period. She testified also (P-1, 816) that he had been limping for some time prior to, and on, the date of the murder. Other witnesses testified in support of the defense that respondent could not have run from the store and the scene of the crime, as testified by prosecution witnesses, because of an injury he had received about two weeks prior to the crime. Rita Catalano, a friend, testified (P-1, 816-17) that respondent visited her on August 20th, and was limping badly. Other witnesses testified that respondent was limping during this period, although he never used a cane or other aid. They were Mrs. James Scoleri (wife of respondent's brother James) (P-1, 833, 845); Dante Scoleri, brother of respondent, testified (P-1, 862) that he saw respondent limping badly on August 21st. Mabel Breckman, mother of respondent, testified (P-1, p. 862) that he was limping during August.

In rebuttal of this testimony, the Commonwealth produced Franklin M. Caraker, a parole agent for the Pennsylvania Board of Parole, who had charge of respondent's case. He testified that he visited respondent at home, 2623 South Juniper St., on August 26th and that respondent came to the office of the witness on August 29th at 9:00 A.M. He saw respondent walk and walked with him in the office for short distances; he saw no limp. (P-1, pp. 891-896.) Under cross-examination, the witness said that had respondent shown any sign of limping, the witness would have noticed it. (P-1, pp. 900-901.) The Commonwealth also called Detective Wiegand, who testified (P-1, 971-2) that he had, in the course of his duties in connection with the case, interviewed the witness, Margaret Sbracci, on September 9, 1958, and that she said nothing of respondent's having been with her at the time of the crime.

The Court of Appeals, in both the Scoleri and Rucker opinions, lays great stress upon the volume and weight of the prior criminal record of Scoleri as against the two-offense record of Rucker. In Scoleri, evidence of twenty-five-

pleas to, or convictions of, serious crimes is mentioned pointedly at pages 32, 35, 36, 37, 38 of the Opinion on the appeal (Appendix "B") and at pages 59 and 60 of the brief Opinion denying rehearing. (Appendix "B"). In the Rucker Opinion, at page 2, the phrase "twenty-five prior robbery convictions" is used, and later in the same paragraph the reference is to "proof of a large number of previous robberies by the accused". (Appendix "B", p. 72, infra).

This recurrence of the phrase "twenty-five convictions of, or pleas of guilty to, charges of armed robbery", within the confines of a very brief exposition of the reason for an about-face, has significance. It seems that the gravity of the claimed prejudice grew with each successive instance of prior crime, grew and grew and grew until "The conclusion that Scoleri was overreached by the procedure followed at his trial is irresistible." (Appendix "B", p. 39, infra).

Petitioner inquires, "At what point in the recital did the conclusion of reversible prejudice become irresistible? Could the jury put the knowledge of twenty prior convictions out of their minds while considering guilt and degree? Fifteen? Ten? Tell us, we ask, what is the magic number at which the quantity, through increase, accomplishes the change in quality of the evidence so as to render it prejudicial? If Scoleri was overreached, what of Parker, of DePoff, of all the others in which this Court refused to review the rulings of the Courts of Appeal, finding that the State of Pennsylvania was not overreaching defendants through this very same procedure? Why is the year of 1962 the year of after-discovered prejudice? (Cf., Appendix "B", p. 50, infra., footnote 8).

Whence is to come the wizardry to determine, from the printed record that a certain jury, in a certain case, was so influenced by learning of a prior record of convictions or of pleas of guilty to a certain number of crimes as to violate the oath of office, ignore the emphatic instructions of the court and to forfeit the life of a defendant who had been committed to its keeping. A certain presumption of regu-

larity used to hedge about the verdict of a jury. Any polling of a jury as to the feature of the case which finally tilted the scales for or against a certain verdict is frowned upon.

The task imposed upon a jury of holding in escrow the knowledge of prior convictions until they have reached a verdict as to guilt and degree of guilt, is a simple act of control compared to the task of taking a record a year or so after the conviction, and attempting to measure the effect of this knowledge upon the minds and consciences of the jurors, watching for the moment when it may be said: "That does it! Prejudice has now matured." Is the Federal Court to scan the newspapers of the time of trial to determine whether any event may have preconditioned the members of a jury to disregard their obligations? Was there a spate of crimes committed by convicts on parole which might have generated such prejudice against the whole class of paroled persons as to make the knowledge of prior offenses impossible to ignore in arriving at the initial verdict of guilt, and the subsequent verdict of degree? Should not the Federal Court have the benefit of a psychological and psychiatric report upon each of the jurors in order to judge his susceptibility to prejudice? Or is it sufficient for the court to conjure up from their own experiences, their philosophies, their attitudes, the probable effect. Grant of certiorari will afford this Court the opportunity to resolve the difficulties indicated in the foregoing *reductio ad absurdum*.

This delegation of conjecture to the federal courts would in effect produce intuitive law and ad hoc decisions. This seems to be in the mind of the Court in Scoleri, when it felt constrained to say, in the Opinon denying rehearing: (Appendix "B", p. 60, infra).

> We have stated the foregoing to make it clear that every case which involves the delicate balance of comity between the courts of state and those of the federal system must be considered and decided on its own precise facts. *In the case at bar we did not lay down a rule of evidence for the Pennsylvania State Tribunal.* We

handed down a judgment as to the fundamental fairness or unfairness of what was done in this particular case." (Emphasis added)

The "foregoing" mentioned was a statement that:

"The issue of Scoleri's guilt as well as the penalty to be imposed on him were both before the jury for determination. Scoleri's defense was an alibi and he attempted to prove that the witnesses who testified that he was at the scene of the crime had made a mistake in identification. In short the issue of identification was vital. On this state of facts we held that the introduction into evidence of the twenty-five prior unrelated convictions of, or pleas of guilty to, charges of robbery with violence were so prejudicial, as to constitute a denial of due process of law to Scoleri." (Appendix "B", p. 60, infra).

The "foregoing" had not been mentioned in the opinion of the Court, handed down before the opinion in Rucker. Neither the word "alibi" nor the word "identification" was mentioned as part of the Court's opinion. (The word "identification" was contained in a quotation from the Commonwealth's offer of proof of the prior convictions, and related to proof of Scoleri's identity with the person named in the Bills of Indictment to be introduced charging those prior crimes.) The original opinion did not advert to the defense advanced by Scoleri at trial, nor to his principal basis for a claim of prejudice, his physical condition. We have seen above the futility of the attempt to establish an alibi, and lack of mobility.

The Court of Appeals here is hard put to it to explain its about-face. The Opinion points out that in *United States ex rel. Thompson v. Price*, 258 F. 2d 918, certiorari denied, 358 U. S. 922 (1958) it had held the very practice here condemned not to be a violation of the standards of fundamental fairness required by the Fourteenth Amendment. In that

case, Judge Hastie, in a concurring opinion, made it clear that he would have dissented if the record of Thompson's prior conviction by a court martial had not been admitted into evidence, not only without objection, but with the consent of defense counsel. (It may be noted here that Judge Hastie, who wrote the opinion in Rucker, upholding the death penalty, has filed a dissenting opinion here, based upon the approval by this court of the habitual offender acts which permit knowledge of the defendant's prior crimes to go to the jury before determination of guilt or innocence. (Appendix "B", pp. 55, 56, infra). The Court, without stating the present moving element in its action, says: (Appendix "B", p. 38, infra)

> "This Court, as presently constituted, limits the position that it took in *United States ex rel. Thompson v. Price* to cases in which the defendant did not object to the admission into evidence of his prior record of unrelated criminal convictions."

The opinion, immediately prior to this statement, had been discussing the habitual criminal statutes, pointing out that the evil result of evidence of prior unrelated crimes could, at most, subject the defendant to an additional prison term, whereas Scoleri had been sentenced to death. Liberty, as mentioned in the Fourteenth Amendment, is now a poor relation of life.

The lower Court's disclaimer of intention to lay down a rule of evidence for the Pennsylvania State Tribunals is the type of rationalization which was warned against in *United States ex rel. Earl Saunders v. Myers, Warden*, 276 F. 2d 790 (3 Cir., 1960). Saunders had been convicted of murder in the first degree, with punishment of life imprisonment, largely upon the testimony of a ten year old boy. Objection was made to the reception of evidence that the boy had identified Saunders in a line-up. The Opinion held: (at page 71)

> "With certain exceptions, see *Sunal v. Large*, (1947) 332 U. S. 174 . . . none of which are here

present, admissibility and sufficiency of evidence are matters for appeal, not habeas corpus. (citing a long list of cases).

"Because, as here, there has been unsuccessful recourse to appeal, does not make habeas corpus available as a further appellate step. Federal Courts may not promulgate rules of evidence for state courts under the guise of preserving due process."

The petitioner, in order not to lengthen this already long petition has refrained from repeating the excellent analysis in the dissent of Judge Kalodner (Appendix "B", p. 39, et seq., infra) which relates to the incorrectness of the judgment. It is appropriate, at this point, to repeat one small part of what he said: (Appendix "B", p. 49, infra)

"At any rate, as it was said in *Baltimore Radio Show v. State*, 67 A. 2d 497, 510, 193 Md. 300 (1949) cert. denied, 338 U. S. 912 (1950):

'Without questioning the soundness of the rule of exclusion prior to verdict, it remains a rule of evidence, not a constitutional right.'

"Here the majority has exalted a simple evidentiary rule to the hallowed status of a constitutional guarantee, and its action is doing so is without precedent."

II. WAIVER

It is submitted that the finding of the Court of Appeals (expressed at Appendix "B", p. 37, infra) that there is a total lack of validity to Petitioner's argument that Respondent waived his right to assert lack of due process in the procedure complained of, is in conflict with the rulings of a

number of other Courts of Appeal, certainly in principle, if not squarely on the facts involved.

The opinion mentions the testimony offered by Respondent and his witnesses corroborating and amplifying the evidence of prior crimes, but the opinion dismisses this evidence as being without significance on the question of waiver since "the fat had already been put in the fire". The opinion then relates the allegation of waiver to a relatively harmless remark by Respondent's girl friend, testifying as a Commonwealth witness, on cross-examination. The opinion does not consider the waiver arising from Respondent's use made of his criminal record when he himself took the stand. It is a not unusual technique for skillful defense counsel to attempt, in desperate straits, to turn the serious criminal record of a defendant who is on parole into an advantage. This is especially so when the overwhelming evidence of guilt demands that the defendant take the stand. This may succeed, even though the jury has not been aware of the record, but the defense knows it will be introduced in rebuttal, for the permissible purpose of attacking the credibility of the defendant-witness. The hope is that the plaintive wail will win over enough jurors to prevent a quick verdict, and eventually gain an acquittal: "Can't you members of the jury see how utterly incredible it is that this defendant, knowing that conviction of a crime will automatically return him to prison for thirty years, would risk the precious liberty which he yearned for during those long years in prison,—would risk everything for the meager proceeds of this corner store?"

Judge Kalodner analyzes the situation well in his dissenting opinion. (Appendix "B", pp. 51-55, infra.) We shall not repeat his references to McCormick and Wigmore.

In bringing in the testimony of Dr. Vasquez, Respondent was actually attempting to use him as a character witness, combining testimony of reformation with charitable interest in his former companion in crime. See the testimony of Dr. Vasquez (P-1, pp. 871-875), and Respondent's own character-building testimony (P-1, pp. 727-730).

A contrary conclusion as to the effect of such testimony following admittedly improper prosecution testimony was reached in the case of *United States v. Gruber*, 123 F. 2d 307 (2 Cir. 1941). Defendant objected to cross-examination of a witness called to attest to defendant's good reputation, as to whether the Assistant Attorney General of the State (the witness was County Judge of Queens County, New York) had reported to the Chief of the Securities Division that "he had received information that Gruber had received a bribe as a Deputy Assistant Attorney General". While the witness denied that he had heard the rumor, "there would, under certain circumstances, be prejudice in suggesting reports of the commission of crimes not within the scope of the indictment". But, whether or not the question was permissible, it cannot be regarded as damaging, in view of the fact that Gruber took the stand himself and was examined fully about the alleged bribery and explained that the charge against him was withdrawn by a litigant and that the matter was closed to the satisfaction of the Attorney General of the State".

Trouser Corp. v. Goodman & Thiese, 153 F.2d 284 (3 Cir. 1946). Under a claim of a third-floor tenant for damages caused by alleged negligence of fourth-floor tenant, of a commercial building, the Court of Appeals found that the court below had erroneously admitted as res gestae a statement made some time after the occurrence by an employee of defendant to an employee of the plaintiff.

However, the Court of Appeals held that defendant waived his objection because defendant asked for production of the statement, and cross-examined its employee, the plaintiff's witness, as to whether he had made the statement, the Court said "Objection to competency is lost if the objecting party offers the same testimony as evidence." (153 F.2d at 288).

It is urged that this question of waiver, as raised here, is of sufficient importance and frequency of occurrence to warrant consideration by this Court.

III. THE FAILURE TO CONSIDER THE EFFECT OF THE VOTE OF JUDGE GOODRICH, EXPRESSED IN THE POST HEARING CONFERENCE.

It is urged that the circumstances presented through the death of Judge Goodrich raised grave possibilities of confusion and misunderstanding among litigants. In a case, such as here, where the death of a judge who has gone on record in some fashion or other, after hearing argument and after having discussed with his colleagues the pros and cons of the case, leaves the balance of the Court in such posture that his vote, if recorded and counted, would bring about a result different from that reached through omitting his vote, some definitive guidance needs to be given by this Court.

As has been noted, the Court which heard the appeal from the order of Judge Grim, dismissing the petition of respondent for a writ of habeas corpus, consisted of eight judges.

The opinion contains the note: "Judge Goodrich participated in the consideration of this case but died prior to the filing of this opinion." (Appendix "B", p. 39, infra).

Judge Kalodner added a footnote at the conclusion of his dissenting opinion (Appendix "B", p. 55, infra, footnote 12) which recites the note by the majority, and adds:

> "It should be noted that at the conference following oral argument of the appeal Judge Goodrich voted to affirm the Order of the District Court denying the writ of habeas corpus."

The opinion denying rehearing states (Appendix "B", p. 60, infra):

> ". . . An expression of a point of view by a member of this Court at conference is tentative. The vote of a member of this Court in the disposition of an appeal occurs after the proposed opinion of the court is

circulated and does not become effective until the opinion of the court is filed. Judge Goodrich died before the circulation of the opinion in this case and therefore did not vote."

Judge Kalodner, concurring in the denial of rehearing said: (Appendix "B", p. 61, infra)

"I must add that I deem the point raised with respect to the failure to count the vote of Judge Goodrich to be without merit."

Argument was heard June 5, 1962; Judge Goodrich died June 25, 1962; the opinion of the Court was filed October 10, 1962. As the opinions indicate, this point had been urged in the Petition for rehearing.

Petitioner, with all respect and affection for the Court, yet insists that the Court which heard the argument and conferred thereon did not agree upon the majority opinion as written.

There is not the slightest indication that Judge Goodrich changed his opinion between June 5, and June 25, 1962. How then, during his life, could "the proposed opinion of the Court" be circulated? The Court was evenly divided, for, obviously, the judges who wrote or concurred in the dissenting opinion did not change their conclusions. The only "opinion" which could have been circulated was one which stated that the Court was evenly divided, and therefore the judgment of the District Court was sustained.

In this very case, in the proceedings before the Supreme Court of Pennsylvania, the report of the case in 399 Pa. 110, presents the same situation, absent, fortunately, the intervention of death.

The report shows (p. 113) that the case was argued October 15, 1959, before a court consisting of Jones, C.J., Bell, Musmanno, Jones, Bok and McBride. Reargument was heard on January 14, 1960, before Jones, C.J., Musmanno, Jones, Cohen, Bok and Eagen, JJ.

A footnote states:

"Mr. Justice McBride's term of office having expired before the reargument, he took no part in the decision of the case."

In denying the petition for a second re-argument, the Supreme Court of Pennsylvania points out that reargument was granted because Mr. Justice McBride's tenure had expired before the appeal had been disposed of. Instead of reaching a decision through the vote of a court thus reduced after argument, the Court ordered a reargument on the merits. The opinion sur Petition for reargument states that counsel for Scoleri were invited also to express their views with respect to the intended effect of the Split-verdict Act, which had been passed December 1, 1959. (399 Pa. 151).

The Rules of the United States Court of Appeals for the Third Circuit, Rules 4 and 5, treat, respectively, of CONSTITUTION OF THE COURT., DIVISIONS., QUORUM., and ASSIGNMENT OF JUDGES.

Rule 4 (3) reads:

"*Court and Divisions—Number of Judges to Sit—Court in Banc.* Cases and controversies shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court in banc is ordered by a majority of the active judges. The court in banc shall consist of all the active circuit judges of the circuit."

Rule 5 (2) reads:

"*Cases to Be Heard By Judges So Assigned.* All matters pending in the court, except matters assigned to a division, matters directed to be heard or reheard by the court in banc and further proceedings in appeals and petitions previously heard by the court on the merits, shall be heard and decided by the judges who have thus been assigned to sit in the court at the time of hearing, if practicable."

It is urged that Rule 4 (3) requires that the hearing before the Court in banc must be determined by the Court in banc which heard the case, not by a diminished court. This is particularly important where, as here, two important factors exist, the fact that it is a capital case, and the fact that States' rights are involved.

It may be argued that the qualifying phrase, "if practicable" in the passage quoted from Rule 5, justifies a determination by less than the full court. It would seem, however, that the phrase refers in that respect to the hearing, and provides for the absence or inability to take part in the case from its inception. To hold the opposite might lead to a ridiculous predicament if the number of the court sitting in banc was lessened, before determination of the case by three, or four, or seven or eight members.

Counsel has been unable to discover any case precisely in point, and urges that this situation merits consideration.

CONCLUSION

The adoption of the split-verdict procedure in Pennsylvania should not militate against the grant of certiorari. The question involved survives, yet the Court below afforded no test, no guidance, which may lead either prosecutor or defense counsel as to his choice when faced in a trial with a comparable situation.

The number of states which retain the so-called Parker Rule, and the number of prisoners serving terms of life imprisonment as a result of convictions after trial in which that procedure was followed, makes the first question here presented one of very great importance. In addition to the precise question involved, there is an example here of the results of the progressive tendency to hold suitable for federal consideration trial procedures which should not be pressed into a single national mold, compelling an imposed uniformity in detail which is disavowed in our legal preaching. We have progressed so far in the direction which M[illegible]

Justice Jackson pointed out some ten years ago, that Courts of Oyer and Terminer begin to wonder what is the good of hearing causes which they may not determine, and the judgment of the highest State Court is merely a springboard into the federal courts, where intuitive justice, the suitor hopes, may mercifully supplant the on-site consideration of living witnesses.

II. The question of waiver, on the other hand, is one which may well be the subject of a definitive ruling which will afford guidance to counsel as to the need to rely upon the validity of their objections to damaging evidence which has been admitted, and the use that may be made of that evidence without waiving the objection.

III. The litigant is entitled to a judgment of the Court which heard the argument. Where, as here, a definitive, irrevocable vote is impossible, then either the revocable vote, rendered at post-argument conference should be counted, absent any indication of a change of conclusion, or, at least, a reargument should be had before a newly constituted Court in banc. Death should have no decisive vote.

Respectfully submitted,

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APPENDIX "A"

Section 701. Murder of the First and Second Degree.

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. If such person is convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence so fixed, as in other cases. In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. The clerk of the court wherein such conviction takes place shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,834

UNITED STATES OF AMERICA EX REL.
ANTHONY SCOLERI,

Appellant,

v.

WILLIAM J. BANMILLER, Warden, Eastern State Penitentiary.

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued June 5, 1962

Before BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*.

OPINION OF THE COURT

(Filed October 10, 1962)

By BIGGS, *Chief Judge*.

In this habeas corpus proceeding, in which the writ was denied,[1] we are concerned with an issue which arises under

[1] See 198 F. Supp. 872 (D.C.E.D.Pa. 1961). Scoleri has exhausted his state remedies. See *id.* p. 873 citing Commonwealth v. Scoleri, 399 Pa. 110, 160 A. 2d 215, certiorari denied, 364 U.S. 849 (1960). Cf. Ex parte Abernathy, 320 U.S. 219 (1943); Darr v. Burford, 339 U.S. 200 (1950); United States ex rel. Ackerman v. Johnston, 235 F. 2d 958 (3 Cir. 1956), certiorari denied, 352 U.S. 942 (1956). See Section 2254, Title 28, U.S.C.

the Due Process Clause of the Fourteenth Amendment, an issue which is almost the same as that which was before us in United States ex rel. Thompson v. Price, 258 F. 2d 918, certiorari denied 358 U. S. 922 (1958), and which we there decided against the relator. The operative facts in the case at bar are somewhat different and we reach a different result.

Anthony Scoleri was indicted, tried, convicted and sentenced to death by the Court of Oyer and Terminer, Philadelphia County, for the felony murder of Max Gordon in Philadelphia on August 28, 1958. The trial took place November 17 through November 26, 1958. A jury was employed. During the prosecution's case-in-chief Richard Febo testified that he had known the relator for about eighteen years and at one time had been sentenced to prison with him. Scoleri's counsel moved for the withdrawal of a juror. This motion was denied but the court informed the jury that it would be charged later "with respect to that kind of testimony". There followed a conference at sidebar as to the method of charging the jury but it is unnecessary to detail that conference here. At a later point in the trial, when Lieutenant William Del Torre of the Philadelphia Police Force, the expert in charge of its ballistics laboratory, was testifying, the issue with which we are concerned came squarely before the trial court. The Assistant District Attorney stated: "I offer to prove for the purpose of penalty the prior record of convictions for armed robbery and burglaries of the defendant through the original bills of indictment . . . and through identification witnesses." Scoleri's counsel objected to any proof of his client's criminal record, specifically relying on the Due Process Clause. The objection was overruled and Scoleri's criminal record was put before the jury, with an instruction, however, that the record was to be considered by the jury solely in connection with fixing the penalty. The court admonished the members of the jury that "you are not to consider this record in any manner whatso-

ever in your consideration of the facts." This admonition was repeated later in the court's charge to the jury.[2]

It was thus brought to the attention of the jury that Scoleri had been convicted of or had pleaded guilty to twenty-five different charges of armed robbery. The jury found Scoleri guilty of first degree murder and returned "Death" as the penalty. That sentence was imposed by the court. A motion for a new trial based on the introduction of Scoleri's criminal record was overruled. The Supreme Court of Pennsylvania affirmed the judgment, three Justices dissenting. The Supreme Court of the United States denied certiorari. See note 1, *supra*. Habeas corpus was denied by the court below. The appeal at bar followed.

On August 28, 1958, the day of Gordon's murder and thereafter until its amendment by the "Split-Verdict Act" of December 1, 1959, P. L. 1621, Section 1, 18 P.S. Section

[2] The court stated: "If you decide in this case, after examining it very carefully, that it is murder in the first degree, then you must consider the penalty. This is your penalty which you indicate, but not impose, and I notice that you have been asked in thundering tones, Are you going to send him to the electric chair on the testimony of David Tupper? Are you going to send this man to the electric chair on the testimony of Dr. Kushner, the optometrist? Are you going to send this man to the electric chair, was thundered at you, on the testimony of Haiz? Certainly, you are not. It would be terrible if you did that. You are not being asked to send this man to the electric chair on the testimony of any single witness. It might well have been said to you that on the combined testimony of all these people what is your determination? Are you going to find him guilty of murder in the first degree? That was not even discussed with you, but I tell you, members of the jury, that you have those other decisions that you can properly make under the testimony in this case, and I bid you recall the evidence as you heard it, and I bid you, if you find a verdict of murder in the first degree in this case, that then, and then only, you consider this man's record and what he is. What is he? What is the enormity of his crime? The Commonwealth seeks no vengeance against him. The Commonwealth in the main seeks deterrence of other people who do this kind of thing, but I don't know that he has done it. That is for you to decide, and when you were sworn you said you would."

4701 (Supp.)." Section 701 of the Pennsylvania Criminal Code of 1939 applied in cases of first degree murder. The second paragraph of Section 701 provided in pertinent part: "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence so fixed, as in other cases. . . ."

The "Split-Verdict Act" of December 1, 1959, provides in pertinent part that: "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty. In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree, they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof. After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon. A failure of the jury to agree upon the penalty to be imposed, shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of opinion that further deliberation by the jury will not result in an agreement upon the penalty to be imposed, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial of the indictment is directed, the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury, and recorded as aforesaid. The court shall impose the sentence so fixed as in other cases. . . ."

Under that portion of the second paragraph of Section 701 of the Criminal Code of 1939 quoted, the jury had the duty of determining the penalty when, as in Scoleri's case, they convicted a defendant of first degree murder. The precursor of the statute referred to was the Act of May 14, 1925, P. L. 759. The earlier Act need not be quoted here for, insofar as the essential elements of the instant case are concerned, its substance was the same. In respect to its effect, Judge Maris of this court, in United States ex rel. Thompson v. Price, 258 F. 2d at p. 921, correctly and succinctly stated: "The Act of 1925 was interpreted by the Supreme Court of Pennsylvania to permit the admission of evidence of prior [unrelated] convictions solely for the purpose of enabling the jury, after it has found the accused guilty of first degree murder, to know what manner of man he is and whether he is entitled to mercy when they undertake their task of deciding what penalty should be imposed upon him." See Commonwealth v. Parker, 294 Pa. 144, 151, 155, 143 Atl. 904, 906-907 (1928), in which Chief Justice von Moschzisker considered the effect upon the admissibility of evidence of prior convictions under the Act of the rule of evidence that, in the trial of a defendant for a crime, evidence of other independent, unconnected offenses committed by him is not admissible to establish his guilt of the crime for which he is on trial. As Judge Maris stated, *id. supra*, at p. 921, "The Chief Justice stated that since the statute required the jurors to assess the punishment and permitted them to extend mercy in a proper case by reducing the penalty to life imprisonment, the jury should be permitted to have the same sort of information that a judge considers when he decides as to the punishment for crime. But since in Pennsylvania the jurors may not render piecemeal verdicts there is no provision for separate inquiry. Hence, concluded the Chief Justice, their single verdict must include both their finding as to the defendant's guilt and their determination as to the penalty to be imposed upon him." Chief Justice von Moschzisker concluded that the prescribed statutory practice was a permissible and proper one.

This ruling was followed by the Supreme Court in later cases[1] and, until the amending statute was passed, was the law of Pennsylvania.[2] It was, as we have stated, followed at Scoleri's trial, despite objections, and was approved by the Supreme Court of Pennsylvania on appeal by a vote of four Justices to three. See Commonwealth v. Scoleri, 399 Pa. 110, 160 A. 2d 215 (1960). We reiterate that, in United States ex rel. Thompson v. Price, *supra*, this court, with two judges dissenting on petition for rehearing, held the practice not to be a violation of the standards of fundamental fairness required by the Fourteenth Amendment. In the case last cited, Judge Hastie, in a concurring opinion, made it clear that he would have dissented if the record of Thompson's conviction by a court martial had not been admitted into evidence not only without objection but with the consent of defense counsel. In the instant case there is no dispute that the record of Scoleri's twenty-five prior unrelated convictions of, or pleas of guilty to, charges of robbery with violence was objected to on the grounds of violation of the guarantee of due process; it is also plain that these objections were adhered to throughout the trial, were asserted in the Supreme Court of Pennsylvania, in the Supreme Court of the United States and in the court below.

The appellee asserts that Scoleri himself opened the door to the admission in evidence of his criminal record, and thereby, in effect, waived his rights under the Fourteenth Amendment. The appellee relies on five incidents which occurred at the trial. First, the appellee points to Scoleri's

[1] See Commonwealth v. Thompson, 389 Pa. 382, 399-400, 133 A. 2d 207, 216 (1957), certiorari denied, 355 U.S. 849 (1957), and the decisions cited in the text. The practice was known as the "Parker Rule".

[2] We deem it unnecessary to discuss in this opinion the Act of March 15, 1911, P. L. 29, 19 P.S. Section 711, or the Act of July 2, 1917, P. L. 1239, held unconstitutional in Commonwealth v. De Poli, 362 Pa. 329, 66 A. 2d 649 (1949), certiorari denied, 338 U.S. 852 (1949).

testimony on direct examination concerning his desire to take Ricky Woods, one of the robbers who had been shot in the hold-up, to the hospital. At this point, he testified, Dante Scoleri, his brother, told him: "Tony, with your record they will never believe you weren't there". [P-1, p. 715] Second, Scoleri also testified on direct examination that when he was asked for help by one of the men who had engaged in the hold-up, he said: ". . . . I told him I had my back time, 30 years—30 years parole hanging over my head, and there wasn't much I could do without becoming involved." [P-1, p. 717] Third, when Scoleri was asked by his counsel who Richard Febo was, he replied: "Richard Febo was my accomplice when we were arrested in 1948 for a series of armed robberies." [P-1, p 729] Four, the appellee asserts that Doctor Anthony F. Vasquez, pastor of St. John the Baptist Church, in Philadelphia, testifying on Scoleri's behalf made reference to Scoleri's criminal record, to his imprisonment and to his [illegible]ing on parole. [P-1, p. 872] Five, that Ida Iocco, a witness called on behalf of the State, testified on cross-examination in reply to the question who is Febo, "He is a friend of Tony's [Scoleri's]. He was in prison with Tony, I understand, I was told." [P-1, p. 470] The appellee points out that Scoleri's counsel made no objection to this statement by Iocco.

But the first attempt at introduction of evidence relating to Scoleri's criminal record was at p. 489 of the transcript of his trial and its first admission was at p. 490 over Scoleri's counsel's objection. A defense motion to withdraw a juror was then denied. The formal introduction of Scoleri's record of twenty-five convictions of or pleas of guilty to armed robbery was at pp. 626-633 of the transcript. At this point the fat had already been put in the fire and the only statement respecting imprisonment or crimes of Scoleri preceding pp. 626-633 and 489-490 was that of Iocco who said at p. 470 that she had been told that Febo and Scoleri had been in prison together. True, Scoleri's counsel or the prosecuting attorney should have moved that this hearsay statement be stricken from the record or the alert trial judge should have done so *sua sponte*. We cannot treat this hearsay

evidence as a waiver of constitutional rights by Scoleri or construe it as an escalator to precipitate twenty-five convictions of or pleas of guilty to charges of armed robbery into the record. Putting the matter bluntly the appellee's argument seems to have been advanced as an afterthought. It is totally lacking in validity. We cannot deem a right inhering in a defendant by virtue of the Due Process Clause of the Fourteenth Amendment to be so easily waived. Glasser v. United States, 315 U.S. 60, 70 (1942).

In respect to the habitual criminal statutes and their applicability, we point out that we are dealing here with a death sentence. The danger resulting from prejudice is always enhanced in a capital case: passions run high, and the penalty is irreversible. Under the habitual criminal statutes the Supreme Court of the United States has permitted evidence of prior unrelated crimes to come before a jury. But the admission into evidence of these prior convictions could, at most, subject the defendant to an additional prison term as a recidivist. The case now before us involved a trial for a capital crime, a crime punishable by death. To say that such evidence is permissible in the former situation and therefore *a fortiori* in the latter, is to ignore the crucial distinction between a trial which could result only in a prison sentence and one which could and in this case did lead to the imposition of the death penalty. The Supreme Court has recognized clearly the validity of this kind of distinction in Betts v. Brady, 316 U. S. 455, 462 (1942). It was there held that although due process does not require that an indigent defendant be furnished counsel in a non-capital case, where the crime is one punishable by death counsel must be provided. The Court stated: "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors

therein disclosed." We think that the principle so well illustrated by the decision in Betts v. Brady, *supra*, is applicable at bar.

This court, as presently constituted, limits the position that it took in United States ex rel. Thompson v. Price to cases in which the defendant did not object to the admission into evidence of his prior record of unrelated criminal convictions. The issue before us was well put by the Supreme Court in Michelson v. United States, 335 U.S. 469, 475, 476 (1948), where it was stated: "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.", citing 1 Wigmore, Evidence (3rd ed., 1940) Section 57.

Despite the careful charge of the experienced judge presiding at Scoleri's trial, in which he explained to the members of the jury their function of finding the defendant guilty or not guilty of murder and their separate function of fixing the penalty of death or life imprisonment, we cannot believe that the procedural scheme imposed by Section 701 of the Criminal Code of 1939 and the "Parker Rule" would permit the jurors to put the knowledge of Scoleri's twenty-five convictions or pleas of guilty out of their minds while considering his guilt or innocence. Certainly such a feat of psychological wizardry verges on the impossible even for berobed judges. It is not reasonable to suppose that it could have been accomplished by twelve laymen brought

together as a jury. The admission of such evidence in Scoleri's trial must therefore be deemed to have been gravely prejudicial. We conclude that Scoleri's trial in this respect was so fundamentally unjust as to cause the trial court to lose jurisdiction. Johnson v. Zerbst, 304 U.S. 458 (1938). The conclusion that Scoleri was overreached by the procedure followed at his trial is irresistible. Cf. United States ex rel. Almeida v. Baldi, 195 F. 2d 815 (3 Cir. 1951), certiorari denied, 345 U. S. 904 (1953). Mr. Justice Burton put the answer to our present inquiry succinctly when he stated in Bute v. Illinois, 333 U. S. 640, 649 (1948), that due process under the Fourteenth Amendment "... has reference ... to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. ...'" Here the conflict is obvious and glaring.

The judgment of the court below will be reversed with the direction to grant the writ of habeas corpus. The Superior Court of Pennsylvania has held that no issue of double jeopardy can be raised under the circumstances. Commonwealth v. Townsend, 167 Pa. Super. 71, 76-77, 74 A. 2d 746, 749 (1950), certiorari denied, 340 U.S. 915 (1951). Scoleri may therefore be promptly retried by the Commonwealth. The "Split-Verdict Act" of December 1, 1959, 18 P.S. Section 4704 (Supp.), will, of course, be applicable.

Judge Goodrich participated in the consideration of this case but died prior to the filing of this opinion.

See also Commonwealth ex rel. Farrow v. Martin, 387 Pa. 449, 127 A.2d 659 (1956), certiorari denied, 353 U.S. 986 (1957); Commonwealth ex rel. Townsend v. Burke, 361 Pa. 35, 41, 63 A.2d 77, 79-80 (1949); Commonwealth ex rel. Wallace v. Burke, 169 Pa. Super. 633, 635, 84 A.2d 254, 255 (1951); Commonwealth v. Gibbs, 167 Pa. Super. 79, 83-84, 74 A.2d 750, 753-754 (1950).

KALODNER, *Circuit Judge*, dissenting:

I dissent from the majority's disposition for two reasons:

(1) I disagree with its holding that the Pennsylvania procedure under which Scoleri was tried transgressed the bounds laid down for state procedure by the due process clause of the Fourteenth Amendment, and

(2) I disagree with its holding that Scoleri did not waive the protection which the majority says was accorded him by the federal due process clause.

It must immediately be noted that, in condemning as an abuse of federal process the Pennsylvania procedure pursued in the Scoleri trial the majority is overruling and not merely limiting, as it asserts—our express ruling to the contrary just four years ago in United States v. Price, 258 F.2d 918, 922, cert. den. 358 U.S. 922 (1958). In *Price*, "We conclude[d] that the Pennsylvania procedure here under attack does not pass the bounds laid down for state procedure by the due process clause". We prefaced that holding with the statement that "It is well settled that no particular form of procedure in state criminal trials is guaranteed by the due process clause of the Fourteenth Amendment", and cited in support the teaching of the Supreme Court of the United States that "it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice."[1]

THE DUE PROCESS ISSUE:

While this Court can overrule its prior holding in *Price*, it can not overrule, nor can it reject, the teaching of the Supreme Court to which we gave effect four years ago in that case.

[1] Hoag v. New Jersey, 356 U.S. 464, 468 (1958).

The case books abound with instances in which the Supreme Court has applied the principles stated in *Price*. A year ago, in Cohen v. Hurley, 366 U.S. 117 (1961) it was held, for example, that exemption from compulsory self-incrimination is not safeguarded as against state action by the Fourteenth Amendment. In Cicenia v. Lagay, 357 U.S. 504 (1958) it was held that the refusal to permit one accused of murder the privilege of consulting his counsel while being questioned by State Police between arrest and arraignment did not of itself violate federal due process. It is interesting to note that in the case just cited this court's ruling to the same effect was affirmed.*

In Twining v. New Jersey, 211 U.S. 78 (1908) it was held that putting the accused on the stand as a witness for the State did not violate federal due process; in Maxwell v. Dow, 176 U.S. 581 (1900) a provision in the Utah Constitution for a jury of eight jurors in all state criminal prosecutions, for other than capital offenses, was held beyond the reach of federal due process; in Hurtado v. People of California, 110 U.S. 516 (1884) it was held that federal due process does not require an indictment by a Grand Jury in a prosecution by a State for murder.

Well over half a century ago, the Supreme Court, in Rogers v. Peck, 199 U.S. 425 (1905) in discussing the sweep of the federal writ of habeas corpus said (pp. 433-34):

> "The extent of the right of the Federal courts to interfere by the writ of habeas corpus with the proceedings of courts and other authorities of a state is carefully defined by statute. When a prisoner is in jail he may be released upon habeas corpus when held in violation of his constitutional rights.
>
> "The reluctance with which this court will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court

* In the Matter of the Application of Vincent Cicenia for a Writ of Habeas Corpus, 240 F.2d 844 (3 Cir. 1957)

upon the subject. *It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted.*" (emphasis supplied)

In Snyder v. Mass., 291 U.S. 97 (1934) Mr. Justice Cardozo, speaking for the Supreme Court, spelled out the doctrine under review as follows (p. 105):

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . *Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.*" (emphasis supplied)

The latter statement is particularly pertinent here in view of the fact that the majority opinion makes it clear that its condemnation of the Pennsylvania trial procedure which permitted introduction of Scoleri's prior criminal record for the avowed purpose of guiding the jury in the fixing of sentence in the event of a guilty verdict is premised on its conclusion that the practice was "gravely prejudicial" to the extent that it was "fundamentally unjust" and resulted in Scoleri being "overreached".

The majority has disregarded the repeated admonitions of the Supreme Court that individual judicial notions and concepts of "unfairness" and "prejudice" and "fundamental injustice" with respect to State criminal procedures, no matter how appealing to the American sense of fair-play, is not the critical test to be applied in the application of the federal due process clause.

In Bute v. Illinois, 333 U.S. 640 (1948) which the majority has cited in support of its disposition, the Supreme

Court recognized and applied the long-established doctrine that States "should have the widest latitude in the administration of their own systems of criminal justice" and held that the reach of federal due process did not extend to the failure in a non-capital case of a State court "to inquire as to the petitioner's [accused's] desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him in his defense", or to offer or assign counsel to the accused.

In so holding the Court said (pp. 649, 650-51-52):

> "The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. It says merely 'nor shall any State deprive any person of life, liberty, or property, without due process of law: . . . .' This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other judicial standards, provided they do not conflict with the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . .' This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts. It recognizes that differences arise naturally between the procedures in the state courts and those in the federal courts.
>
> "One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the

states and the Federal Government. . . . While there have been modifications made by the states, the Congress and the courts in some of the relations between the Federal Government and the people, there has been no change that has taken from the states their underlying control over their local police powers and state court procedures."

This Court, in United States ex rel. Darcy v. Handy, 224 F.2d 504 (1955), aff'd 351 U.S. 454 (1956) gave cognizance to the "established constitutional doctrine" of "our limited function in correcting *fundamental* impropriety in state trials challenged under the due process clause" and said that it "makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court". (emphasis supplied)

The majority has prefaced its holding that the introduction into evidence of Scoleri's prior criminal record was "gravely prejudicial" and "so fundamentally unjust" as to constitute violation of federal due process with citation of Michelson v. United States, 335 U.S. 469 (1948) and quotation of a statement therein that "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by *propensity* a probable perpetrator of the crime." (emphasis supplied)

It must immediately be stated that in *Michelson* the issue of violation of federal due process in a state criminal trial was not involved. In that case the defendant had been tried in a *federal* court for the bribery of a federal officer and since he had admitted the payment but claimed it was induced by the officer the case hinged on whether the jury believed the defendant or the officer. The federal prosecutor in cross-examination of defendant's character witnesses asked them if they had heard that defendant had been arrested 27 years previously for receiving stolen goods and

the issue presented to the Supreme Court was whether the questioning with respect to the arrest constituted reversible error.

The statement in *Michelson* that evidence of an accused's "prior trouble with the law" or "specific criminal acts" was inadmissible to establish "propensity" to criminal conduct was made in the course of a general discussion of rules of evidence relating to such testimony.

Michelson is completely inapposite to the situation here. In the instant case the Pennsylvania procedure under which Scoleri was tried permitted the introduction of evidence of his prior criminal record not to establish "propensity" but for the single purpose of aiding the jury in its function, under Pennsylvania statute, of fixing the penalty, viz., life imprisonment or death, in the event that it found him guilty of murder in the first degree. As the majority has noted "the experienced judge presiding at Scoleri's trial" gave the jury a "careful charge" in which he, as required by the Pennsylvania decisions, properly cautioned it with respect to the limited use of the criminal record testimony.

The majority has decided, nevertheless, that it would be a "feat of psychological wizardry . . . impossible even for berobed judges" for jurors "to put the knowledge of Scoleri's twenty-five convictions or pleas of guilty out of their minds while considering his guilt or innocence" and therefore holds the Pennsylvania procedure a violation of federal due process.

In doing so it has completely overlooked the fact that the Supreme Court of the United States has time and again sanctioned the admission of prior criminal records for the purpose of fixing the more severe punishment provided under multiple offender and habitual criminal statutes.

It has also overlooked the fact that under the National Prohibition Act, 27 U.S.C.A. 46, which fixed heavier sentences for second violations and provided that a prior conviction should be pleaded in the "affidavit, information or indictment" charging the second offense, this Court held that introduction of evidence of the prior conviction at the

trial for the second offense was not only permissible but required. Hefferman v. United States, 50 F.2d 554 (1931).

Habitual criminal statutes providing for greater punishment of second or subsequent offenses by the same person have long been in force in this country[1] and in England. It is the established rule, under such statutes, unless the statute designates a different mode of procedure, that, if the prosecutor desires to invoke the more severe punishment provided as to second or subsequent offenders, the indictment or information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury.

The Supreme Court, as long ago as 1895, held in Moore v. Missouri, 159 U.S. 673 that a Missouri habitual criminal statute was not in violation of the Fourteenth Amendment or any other provision of the Federal Constitution. In doing so it stated (p. 677):

> "The fact that the indictment charged a former conviction of another and entirely different offense is not, in fact, charging him with an offense with respect of the former offense in the case in hand. *The averments as to the former offense go as to the punishment only.*" (emphasis supplied)

Six years later, in 1901, the Supreme Court in McDonald v. Massachusetts, 180 U.S. 311, in holding that the Massachusetts habitual criminal statute, which provided for charging a former conviction in the indictment, did not violate any of the provisions of the Fourteenth Amendment, rejected the appellant's express contention that "Any statute allowing the government to make bad character a part of its original case is unconstitutional." In doing so the Supreme Court said (p. 313):

[1] To the same effect, Massey v. United States, 281 Fed. 293, 296-98 (8 Cir. 1922); Smith v. United States, 41 F.2d 215, 217 (9 Cir. 1930), cert. den. 282 U.S. 879.

[1] In Virginia and New York as early as 1796 and in Massachusetts since 1804.

"The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, *and goes to the punishment only*." (emphasis supplied)

In Graham v. West Virginia, 224 U.S. 616 (1912) it was held (pp. 629-630):

"Although the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt, and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided.

"A state may make different arrangements for trial under different circumstances or even the same class of offenses."

The foregoing illustrates the teaching of the Supreme Court that the choice of methods for the conduct of criminal trial procedures insofar as they may relate to the order of the introduction of evidence having impact on the critical issue of sentence is reserved to the separate states, and that the freedom of such choice is not proscribed under the Fourteenth Amendment.

A long line of cases in the State courts involving state multiple and habitual offender laws have approved the admissibility of evidence of prior convictions before the defendant's guilt or innocence of the subsequent offense has been determined by the jury. See, e.g., State v. Meyer, 258 Wis. 326, 46 N.W.2d 341 (1951); Atha v. State, 217 Ark. 590, 232 S.W.2d 452 (1950); People

Finally, on the score of what has been said it must be noted that this Court in United States v. Claudy, 204 F.2d 624 (1953) gave effect to the holding in Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937) that:

> *"For the determination of sentences justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him."* (emphasis supplied)

In *Claudy* we in fact held that "fundamental fairness in judicial procedure required that the court impose an enhanced penalty only upon the basis of a supporting judicial determination of the essential facts made after the defendant had been informed of and heard upon the issue of recidivism" and that "The omission of such procedure was a denial of due process of law. . . ." 204 F.2d 629.

An analysis of judicial decisions discloses that the courts have also permitted wide latitude in the admission of evidence relating to criminal conduct of an accused, independent of the crime charged in the indictment, when evidence of such conduct was introduced to establish "intent" or "design" or "capacity" or "identity" of the actor.[1]

Thus, in United States v. Laurelli, 293 F.2d 830, cert. den. 368 U.S. 961, this Court just a year ago, in a trial charging bribery attempt, sanctioned introduction of testimony of unrelated bribery attempts by the same defendant, one, eleven months, and the other, fourteen or fifteen

[1] Lawrence, 350 Ill. 199, 61 N.E.2d 361 (1945), cert. den. 326 U.S. 741; Egbert v. Jones, 350 S.W.2d 178 (Ky. 1961), cert. den. 369 U.S. 845.

[2] United States v. Stirone, 262 F.2d 571, 576 (3 Cir. 1959), rev'd. on other grounds, 361 U.S. 212 (1960).

months, after the bribery attempt charged in the indictment, on the ground that the subsequent conduct was admissible "to show defendant's intent" and a "pattern". 293 F.2d 832.

Evidence of other similar offenses has time and again been held to be admissible for the purpose of establishing *intent* in cases of assault with intent to rape and in prosecutions for crimes involving a depraved sexual instinct. In prosecutions for adultery evidence of prior adulterous conduct has also been held admissible.[2]

Again, defendants in criminal cases who offer good character testimony open the door to the introduction of prior criminal records.

What has been said on the score of the exceptions to the general rule which excludes evidence of other crimes designed to show *propensity* makes it clear that the exceptions are almost as general as the rule itself.

At any rate, as it was said in Baltimore Radio Show v. State, 67 A.2d 497, 510, 193 Md. 300 (1949), cert. den. 338 U.S. 912 (1950):

> "Without questioning the soundness of the rule of exclusion prior to verdict, it remains a rule of evidence, not a constitutional right."

Here the majority has exalted a simple evidentiary rule to the hallowed status of a constitutional guarantee, and its action in doing so is without precedent.

In conclusion, this too must be said on the score of the majority's holding that the Pennsylvania procedure pursued in the Scoleri trial violated federal due process.

While it is true that the denial of an application for certiorari by the Supreme Court of the United States is not to be construed as approval of the decision sought to be reviewed, it at least merits observation that the Court has in recent years denied applications for certiorari in ten cases including that of Scoleri, where the Pennsylvania Supreme Court had sustained convictions in cases tried

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[2] 2 Wigmore, Evidence (3rd ed. 1940) § 398[illegible].

pursuant to the procedure now condemned by the majority as in violation of federal due process, and in Thompson v. Price, supra, where we specifically held that the procedure involved was not in violation of federal due process. On this score it certainly cannot be said that the United States Supreme Court has in recent years failed to evidence adequate appreciation of the vitality and sweep of the federal due process clause. It merits notation that in only one of the cases in which certiorari was denied, Commonwealth v. Rucker, *sub. nom.* Rucker v. Pennsylvania, 368 U.S. 868 (1961),[5] one justice expressed an opinion that it should have been granted.

[5] The ten applications denied, including that of Scoleri, are as follows:
Commonwealth v. Simmons, 361 Pa. 391 (1949), cert. den. 338 U.S. 862 (death sentence imposed)
Commonwealth v. DePofi, 362 Pa. 229 (1949), cert. den. 338 U.S. 852 (death sentence imposed)
Commonwealth v. Johnson, 372 Pa. 266, 276-77 (1953), cert. den. 345 U.S. 959 (life imprisonment imposed)
Commonwealth v. Lowry, 374 Pa. 594, 603 (1953), cert. den. 347 U.S. 944 (life imprisonment imposed)
Commonwealth v. Cannon, 386 Pa. 62, 63-65 (1956), cert. den. 352 U.S. 898 (life imprisonment imposed)
Commonwealth v. Thompson, 389 Pa. 382 (1957), cert. den. 355 U.S. 849 (death sentence imposed)
Commonwealth ex rel. McNeair v. Banmiller, 391 Pa. 119 (1958), cert. den. 356 U.S. 946 (life imprisonment imposed)
Commonwealth v. Wilson, 394 Pa. 588, 608 (1959), cert. den. 361 U.S. 847 (life imprisonment imposed)
Commonwealth v. Scoleri, 399 Pa. 110 (1960), cert. den. 364 U.S. 849 (death sentence imposed)
Commonwealth v. Rucker, 403 Pa. 262 (1961), cert. den. 368 U.S. 868 (death sentence imposed)
In addition the Supreme Court denied the application for certiorari, 358 U.S. 922, from our decision in United States ex rel. Thompson v. Price, 258 F.2d 918 (1958) holding that the Pennsylvania procedure here involved was not an abuse of federal due process.

[6] Appeal is now pending in this Court from the denial of a writ of habeas corpus by the United States District Court for the Eastern District of Pennsylvania in United States ex rel. Herman

THE WAIVER ISSUE:

The majority holds that Scoleri did not, at his trial, waive the protection which it says was accorded him by the federal due process clause. It dismisses as "totally lacking in validity" the contention of the Commonwealth of Pennsylvania, via the appellee, to the contrary.

I disagree.

Assuming, arguendo, that the majority has correctly held that the admission into evidence of Scoleri's criminal record, over his objection, in the course of the prosecution's case, was fundamental error violative of federal due process, the trial record establishes that Scoleri waived or cured that error when he invoked his criminal past in the presentation of his defense, as subsequently detailed.

On that score, it is settled law that federal due process rights may be waived "intelligently and understandingly", Carnley v. Cochran, 369 U.S. 506, 513 (1962), and whether such a waiver has occurred "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused", Johnson v. Zerbst, 304 U.S. 458, 464 (1938); further, an error in the admission of testimony, over objection, is *cured* when the party injured thereby subsequently offers similar testimony in his own defense, 1 Wigmore, Evidence, §18(D) (3 ed. 1940); otherwise stated, "If it happens that a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, of course, he has *waived* his objection", McCormick, Evidence, §55, at 129 (1954).

First, as to the "background" and "experience" of Scoleri:

Rucker v. Myers, 209 F. Supp. 557 (1961). The proceedings in the District Court were filed subsequent to the denial of Rucker's application for certiorari by the United States Supreme Court, supra, note 8.

The record discloses that he was almost 30 years old at the time of his trial; he had earlier served some six years of a 20-40 year jail sentence following pleas of guilty in April 1948 to indictments charging him with participation in 22 separate armed robberies; after getting out of jail he worked for a year as a secretary to Dr. Vasquez, a Baptist minister, and then completed one year of study at a liberal arts college in West Virginia; he had been a Sunday school teacher and had served as vice-president of the Youth Fellowship of his church which he attended regularly.

Second, as to Scoleri's "conduct" at his trial:

When Scoleri took the stand in his own defense, his counsel, Colonel Colbert C. McClain [a former assistant district attorney], almost immediately proceeded to examine him with respect to damaging state's evidence that he had given shelter to one Ricky Woods who had been wounded by a pistol shot while participating in the robbery-murder for which Scoleri was being tried and that Woods had died without receiving any medical attention and was subsequently given furtive burial by Scoleri and his brother Edward [10] in a shallow grave which they dug with improvised implements in a wooded area in New Jersey. Scoleri readily admitted the truth of the state's evidence as outlined, and, in the course of doing so, gave the following "explanation" of his failure to take Woods to a hospital when he was unable to get a doctor to treat him:

> ". . . I asked Dante [Scoleri's brother] to take Ricky and me to the hospital to get some medical attention, and he exclaimed, *'Tony, with your record they will never believe you weren't there.* You can't be involved. Doh't get involved,' he screamed.

[10] Edward Scoleri had also been indicted as a participant in the robbery-murder but had been granted a severance (separate trial) on his application. He subsequently pleaded guilty and was sentenced to life imprisonment.

"I said, 'The man needs help.'

"He said, 'I don't want to have anything to do with it, and I suggest you don't have anything to do with it.'" [P-1, pp.714-715]

With respect to his participation in Wood's macabre burial, Scoleri, in repsonse to his counsel's question: "Why did you do that, Tony", made this reply:

"Eddie was a total mess. He was in a stupor. He had been drinking rather heavily, and at the apartment he was drinking even more, and he was completely numb. He didn't know what to do, and he begged me to help him. He said, 'Help me, Tony.'

"... *So I told him I had my back time, 30 years —30 years parole hanging over my head*, and there wasn't much I could do without becoming involved.

"Eddie broke down and cried, and I said, 'I don't know what to do'." [P-1, pp. 716-717]

After Scoleri's counsel elicited the information that Edward was his "baby brother" he asked him:

Q. "Did you want to help your brother?

A. "I did, sir.

Q. "Is that the reason why you did these subsequent things after Ricky Woods died?

A. "Yes." [P-1, p. 718]

The foregoing establishes, as earlier stated, that Scoleri's prior criminal record was invoked by him as part of his "defense" of undisputed conduct which the jury could properly find, as it did, involved him in the commission of the robbery-murder. That being so, under the principles stated, Scoleri *waived* and or *cured* the fundamental error which the majority holds was committed in the admission of evidence of his prior criminal record in the presentation of the state's case.

Still another instance must be cited of Scoleri's invoking of his prior criminal record as part of his "defense". A state witness, Richard Febo, had testified that Scoleri, on the day of the robbery-murder, had shown him two revolvers which he said were to be used by him in a hold-up or armed robbery and had invited him to participate, but he declined. In an apparent effort to discredit Febo's testimony Scoleri was asked by his counsel:

> Q. "Who is Richard Febo?
>
> A. "Richard Febo was my accomplice when we were arrested in 1948 for a series of armed robberies.
>
> Q. "Do you know of your own knowledge how much back time Febo has?
>
> A. "He has 30 years' back time." [P-1, p. 729]

Scoleri then testified that when Febo, with whom he had served in jail, "first came home from prison he was unstable emotionally and distraught . . . given to outbursts of temper and crying spells", and he introduced him to Dr. Vasquez "for some spiritual aid".

It is of course obvious that again Scoleri premised a defense maneuver with respect to Febo's testimony on his "concern" for this "emotionally and distraught" man, and that a necessary ingredient of the defense strategy was the establishment of their past common criminal association.

It may further be observed that Dr. Vasquez was called by the defense to corroborate Scoleri's testimony that Febo was an unreliable witness. He testified that Scoleri brought Febo to see him at one time and said to him, "Here is a boy who is very badly mixed up. Let us see if we can help him". In doing so Dr. Vasquez testified preliminarily that Scoleri "did fine work for me *when he came out of the penitentiary*". Here again a Scoleri defense witness testified as to his prior criminal record thus waiving or curing the "fundamental error" condemned by the majority." [P-1, p. 872]

There remains only this to be said.

The federal due process clause which was designed to protect the innocent should not be discredited by its use to afford "mere technical loopholes for the escape of the guilty". Stein v. New York, 346 U.S. 156, 196-197 (1953). It was there said (p. 197):

> "The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law."

In the instant case Scoleri had a "fair trial and fair review" by the Supreme Court of Pennsylvania. The people of the State of Pennsylvania "are also entitled to due process of law".

For the reasons stated I would affirm the Order of the District Court denying Scoleri's petition for the writ of habeas corpus.[1]

Judge Staley joins in the foregoing.

HASTIE, *Circuit Judge*, dissenting.

Concurring specially in *United States ex rel. Thompson v. Price*, 1958, 258 F.2d 918, 922, I expressed the view

[1] I have not adverted to the circumstance that Scoleri's counsel had brought to light his criminal past in cross-examination of Ida Iocco, a state witness, long before the state introduced into evidence the mooted criminal record, because in my opinion it is unnecessary to rely on it in view of the conduct of the defense in making Scoleri's criminal record a vital defense factor thus waiving or curing the state's error, if error it be.

It was on cross-examination of Mrs. Iocco that the defense elicited the statement that Febo "was in prison with Tony [Scoleri]." Mrs. Iocco had not on the state's direct examination even mentioned Febo or made any statement with respect to Scoleri's prison service.

[2] The majority has noted that "Judge Goodrich participated in the consideration of this case but died prior to the filing of this opinion." It should be noted that at the conference following oral argument of this appeal Judge Goodrich voted to affirm the Order of the District Court denying the writ of habeas corpus.

that, but for the defendant's acquiescence, it would have been gravely unfair to permit the introduction of his prior criminal record during the course of his trial and before the determination of guilt or innocence, since the only legitimate function of that evidence, guidance in the imposition of sentence, could as well have been achieved by its introduction after guilt had been determined. This case presents the same basic question.

It is true, as JUDGE KALODNER points out in his dissent here, that there are various situations in which courts have admitted evidence during a criminal trial which has both a legitimate function and a probable prejudicial effect. But in those cases, in order to get before the jurors certain information which they should have, it was necessary to risk the prejudice which this information might create. What makes the present case different is the fact that there was an easy, simple and obvious way of achieving the legitimate effect of the evidence of prior convictions without subjecting the defendant to its prejudicial effect on the issue of guilt or innocence. It seemed to me in the *Thompson* case and it seems to me now that it is unfair for a state to employ a seriously prejudicial procedure when an obviously satisfactory non-prejudicial alternative is available.

However, there is one line of cases, which did not have to be considered in the *Thompson* appeal because of the defendant's acquiescence, which must be considered here. This is the line of Supreme Court decisions sustaining habitual offender statutes. Under some of these statutes, the procedure has been to present evidence of prior convictions to the jury along with the evidence of the alleged new offense. In other cases, evidence of prior crime has not been introduced until after conviction. The significant thing is that the Supreme Court has sanctioned both procedures with no indication that the prejudice inherent in one amounts to a constitutional defect. *Graham v. West Virginia*, 1912, 224 U. S. 616; *McDonald v. Massachusetts*, 1901, 180 U. S. 311; *Moore v. Missouri*, 1895, 159 U. S. 673. More recently, in *Chandler v. Fretag*, 1954, 348 U. S. 3, the Supreme Court

considered a conviction under the Tennessee habitual offender statute which contained the prejudicial feature of introducing the evidence of prior crimes before a determination whether the accused was guilty of the alleged new offense. The court took note that the determination of prior convictions and the trial on the new offense "may be conducted in a single proceeding" before the trial jury. 348 U. S. at 8. While the contested issue on that appeal was an alleged denial of the right to counsel, the presently significant fact is that the Court ordered a new trial to be conducted under the Tennessee procedure of submitting evidence of prior convictions to the jury during the course of the trial.

The prejudice involved in the procedure under such habitual offender statutes and the obvious availability of a non-prejudicial alternative are as clear and as serious as the avoidable prejudice to which Scoleri has been subjected. So long as the Supreme Court sanctions the one procedure it seems to me that an inferior court is not justified in holding the other unconstitutional. We are faced with the always difficult question whether undesirable state practice is so bad as to be intolerable. I am constrained to follow the teaching of the Supreme Court in the habitual offender cases that such an undesirable practice as we have here is tolerable although, without that guidance, I would be disposed to reach the opposite conclusion.

The majority opinion distinguishes the Supreme Court cases upholding the habitual offender statutes on the ground that conviction under those statutes merely results in very long terms of imprisonment, life imprisonment in many cases, while Scoleri has been sentenced to death. I do not believe that the habitual offender cases turn upon this distinction between death and long term imprisonment. However, it is true that such cases as *Betts v. Brady*, 1942, 316 U. S. 455, indicate that the Supreme Court is less reluctant to condemn state procedure as a denial of due process when human life is at stake than when imprisonment only is in-

volved. But I can find nothing in the habitual offender cases that in any way suggests a judicial conclusion that the procedure in question was disturbingly unfair, but not quite unfair enough to warrant federal interference with the state conviction because the litigation did not involve a death penalty. Rather, the Court seems to have felt that the use of prior conviction evidence during the trial of the issue of guilt or innocence was not the sort of extreme unfairness which could in any case amount to denial of due process of law. Moreover, underlying the *Betts v. Brady* line of cases on the right of indigents to counsel is the consideration that the providing of suitable professional representation for every indigent person accused of a non-capital crime does involve practical difficulties and would impose a great burden upon the bar. No such consideration is involved here. For these reasons, I am not persuaded by the undertaking of the majority to distinguish the habitual offender cases.

Finally, I do not agree with JUDGE KALODNER'S view that Scoleri "waived" his objection to the introduction of his criminal record. That argument is based upon references made to the defendants' earlier crimes during the course of his defense after the elaborate and prejudicial criminal record had been introduced in evidence, over strenuous objection, during the course of the government's case in chief. I can find neither reason nor justice in a ruling which would give such detrimental effect to the defendant's effort to make the best of a bad situation after it had been created over his objection. My dissent is based solely upon my judgment that the habitual offender cases control the constitutional issue in this case.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,934

UNITED STATES OF AMERICA EX REL.
ANTHONY SCOLERI,

Appellant,

v.

WILLIAM J. BANMILLER, Warden, Eastern State
Penitentiary,

On Petition for Rehearing and on Petition for Leave to Intervene *Amicus Curiae* and to File a *Praecipe* for Appearance.

Before BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, and SMITH, *Circuit Judges*.

OPINION OF THE COURT

(Filed December 11, 1962)

PER CURIAM.

In view of the petition for rehearing we must reemphasize the principles inhering in our decision. The Commonwealth introduced into the record in its case in chief, as we have stated, Scoleri's twenty-five prior unrelated convictions of, or pleas of guilty to, charges of robbery with violence. The admission of this evidence was duly objected to on con-

stitutional grounds. The issue of Scoleri's guilt as well as the penalty to be imposed on him were both before the jury for determination. Scoleri's defense was an alibi and he attempted to prove that witnesses who testified that he was at the scene of the crime had made a mistake in identification. In short, the issue of identification was vital. On this state of facts we held that the introduction into evidence of the twenty-five prior unrelated convictions of, or pleas of guilty to, charges of robbery with violence were so prejudicial, so unfair, as to constitute a denial of due process of law to Scoleri.

We have stated the foregoing to make it clear that every case which involves the delicate balance of comity between the courts of a state and those of the federal system must be considered and decided on its own precise facts. In the case at bar we did not lay down a rule of evidence for the Pennsylvania State tribunals. We handed down a judgment as to the fundamental fairness or unfairness of what was done in this particular case.

As to the contention that this court was evenly divided in opinion and that therefore the decision of the court below must stand, we will state the following. An expression of a point of view by a member of this court at conference is tentative. The vote of a member of this court on the disposition of an appeal occurs after the proposed opinion of the court is circulated and does not become effective until the opinion of the court is filed. Judge Goodrich died before the circulation of the opinion in this case and therefore did not vote.

In the light of all the circumstances we can perceive no valid reason for permitting the President of the District Attorneys Association of Pennsylvania to intervene *amicus curiae* and to file a *praecipe* for appearance even though we assume, without deciding, that the Association's President possesses *locus standii* in the instant proceeding.

The petitions will be denied.

KALODNER, *Circuit Judge*, concurring.

I have joined in the denial of the petition for rehearing since all the points raised in it with the exception of that which relates to the "failure to count the vote" of our deceased brother, Goodrich, have already been considered by the Court en banc.

I must add that I deem the point raised with respect "to the failure to count the vote of Judge Goodrich" to be without merit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Misc. No. 2222

UNITED STATES OF AMERICA,
EX REL. ANTHONY SCOLERI

WILLIAM J. BANMILLER, Warden
Eastern State Penitentiary, Philadelphia, Pennsylvania

OPINION

GRIM, *J.* October 4, 1961

Relator, confined in a Pennsylvania prison under sentence of death for first-degree murder, has petitioned for a writ of habeas corpus. He appealed his conviction to the Supreme Court of Pennsylvania, which affirmed the judgment, 399 Pa. 110 (1960). The Supreme Court of the United States denied certiorari, 364 U.S. 849 (1960). Respondent has filed an answer to the petition for habeas corpus, and extensive testimony has been taken.

The murder trial began at Philadelphia Monday, November 17, 1958, and lasted nine days. Relator's defense was an alibi. On the sixth day, Saturday, relator's brother testified for the defense. Later that day relator testified in his own defense. The brother's testimony conflicted with relator's in such a way as to weaken relator's defense considerably and made it appear that relator would be convicted.

On the morning of the seventh day of the trial, Monday, November 24, a guard at Holmesburg Prison, Philadelphia, found relator, "lying on cell Bed, with left arm cut in a few places, cell in some disorder & Blood spattered

on floors & walls." The guard summoned a prison doctor at about 6:35 a.m. The doctor arrived on the scene at about 7:00 a.m., and examined relator both in his cell and in the hospital block of the prison, to which he was carried on a stretcher.

On examination, the doctor found 24 shallow cuts, between the wrist and the elbow, in relator's left arm. Only one cut, near the elbow, went through the skin, and when the doctor examined him, blood was flowing very slowly from only this cut. At the time of the examination relator was conscious, his pulse rate was 74, his blood pressure was normal (the reading being 130 82), his color was good, his breathing was good, and his general physical condition, save for the cuts, was good. He appeared strong enough to run. His eyes were squeezed tight shut, his head was rolling back and forth, and he did not speak. While the doctor was treating him, cleaning, sterilizing, and suturing the cuts, relator tried to fight the insertion of the sutures. He did not respond when the doctor asked that he twist his hands or move his fingers, a test of possible damage to the tendons.

At the doctor's direction relator was given 600,000 units (an average dose) of penicillin to prevent infection from the cuts, and 100 milligrams of thorazine (chlorpromazine), a tranquilizer, to quiet him.

Directly after this treatment relator was placed in a wheel chair and taken to the prison yard, where he was carried and placed on a stretcher in a prison van for transportation to the trial. In the van he appeared to be listless, motionless, lifeless, and in a stupor. On arrival at the place of trial, City Hall in Philadelphia, relator was carried out of the van on a stretcher to an elevator, where the guards placed him on a chair to get him on the elevator. On leaving the elevator he was again placed on a stretcher and carried on it to an anteroom to the court room.

In the anteroom he was examined by Dr. Bove, a physician in the Police Surgeon's office, at about 9:30 a.m. At that time relator was sitting in a chair. He appeared

somewhat somnolent and his pupils were contracted, but he revived easily when the doctor applied aromatic spirits of ammonia to his nostrils, although he resisted this attempt to revive him. His pulse was full and regular, about 78. The doctor took out a pack of cigarettes and said, "Tony, have a cigarette." Relator reached over, took a cigarette from the pack, and put it in his mouth. He retained his position in the chair. During the examination relator answered when the doctor spoke to him. In the doctor's opinion relator was then alert enough to know what was going on, 95% of full alertness, and was competent to stand trial.

As Dr. Bove was leaving at about 10:00 a.m., another police surgeon, Dr. Carideo, entered and examined relator. When Dr. Carideo made his examination, relator was lying on a stretcher, his eyes were closed. He said nothing, his blood pressure was slightly low, his pulse was rapid, there was no pallor, and there was no sign of respiratory depression. His muscle tone was good. When the doctor held a phial of aromatic spirits of ammonia to his nose he quickly and forcefully turned his head from side to side, and when the doctor persisted, relator took a deep breath and held it until the doctor removed the ammonia. There was an element of resistiveness when the doctor manipulated his arms. He did not respond to the doctor's questions. The doctor felt that he was under the influence of some sedation, and for this reason recommended to the trial judge that he should not be put on trial, but should be allowed a sufficient time in which whatever he might have been given would dissipate. He examined relator several times during the day and at 7:30 p.m. observed that relator's pupils were no longer contracted, that his pulse rate was better, that his blood pressure was normal for his age and body build, and that his respiration was still not embarrassed. On the basis of the doctor's opinion that relator was then fit to stand trial, the trial resumed at 7:30 p.m.

When the trial resumed, relator lay motionless on a stretcher. Dr. Carideo remained continuously in attendance

on him that evening, and there was no change in his condition. At one point during the evening relator said he was cold and pulled a blanket up close to his neck. He also asked for water.

At 10:20 p.m. on the seventh day of the trial, after the defense had completed its evidence and before the prosecution presented its rebuttal evidence, defense counsel objected to the production of any rebuttal on the ground that relator's condition at that time was such that defense counsel were unable to consult with him or talk to him about the evidence about to be offered. The response of the court was:

> "I have been advised before we brought him in that he was able to consult. I have been advised by the doctors. A doctor is here in attendance, and he has stated that since that time he is better able than he was five hours ago, which antedated the time we started this session by two hours, and you notice this, he has asked for water, and he has asked for a blanket, and inasmuch as some of the testimony has been taken within his presence and within his hearing, I do not propose to have this case interruped any longer.
>
> "Your objection is overruled."

The trial proceeded.

When the trial recessed that night relator was returned to the prison at about 11:45 p.m. He walked into the van at City Hall that night. When he arrived at the prison he walked out of the van and up five or six steps into the prison hospital.

Relator now seeks habeas corpus, contending that his conviction was void (1) because evidence of his criminal record was placed before the jury, (2) because relator was not present when the trial judge heard evidence of his ability to stand trial, and (3) because during part of the trial he was unable, because of his physical condition as previously described, to receive the effective assistance of counsel.

The Court of Appeals for the Third Circuit held in *United States v. Price*, 258 F.2d 918, 923 (1958), that the Pennsylvania procedure of admitting evidence of the defendant's criminal record, prior to any verdict, in order to guide the jury in fixing the punishment in the event of a verdict of guilty of first-degree murder, "does not pass the bounds laid down for state procedure by the due process clause," 258 F.2d at p. 922. While the Court of Appeals was divided on this case, the decision stands and is binding on this district court. It would not become this court to accept counsel's invitation to speculate on the possible effect of changes in the membership of the Court of Appeals.

The Pennsylvania statute allowing the jury to determine the penalty in cases of murder in the first degree was amended following Scoleri's conviction but before final argument on his appeal to the Pennsylvania Supreme Court, by the Act of December 1, 1959, P. L. 1621, 18 P.S. §4701. The amendment provides for a "split verdict" in such cases. The jury is first to determine the defendant's guilt or innocence, and then, in the event of a verdict of guilty of murder in the first degree, the jury is to "receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant. . . . The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree on." In relator's appeal the Pennsylvania Supreme Court held that the amendment was not retroactive and not applicable to his case. The amendment in no wise affects the binding authority of *United States v. Price*, supra, in which the court albeit with some reluctance, held the prior procedure not violative of due process.

Absence When Trial Judge Heard Evidence of Ability To Stand Trial

The trial judge heard the medical reports concerning relator's condition in the presence of counsel for the prosecution and the defense. The jury was not present, nor was the relator.

At the opening of court on the morning the trial judge charged the jury, the following occurred:

> "THE COURT: Does the defense want a physical examination of the defendant this morning?
>
> "MR. McCLAIN: No, sir.
>
> "THE COURT: I have now dismissed the Commonwealth's physician.
>
> "Before we start, I want you to know that under professional medical advice this defendant's trial continued, notwithstanding what you have witnessed here in this courtroom. The professional medical advice was that he was competent to hear everything intelligently, his pulse was normal, there was no high blood pressure, no distress, and there was no medical reason for this particular condition, an obvious condition, and the physicians say there was nothing wrong with him whatsoever. Had it been that he was incapable of hearing what was going on here, we could not have proceeded. We would have just had to continue the case. We continued it for one day, as you know."

Immediately thereafter the court charged the jury.

There are numerous general statements to the effect that a defendant is entitled to be present at every stage of criminal proceedings against him. The problem underwent close scrutiny in *United States v. Johnson*, 129 F.2d 954 (3d Cir. 1942),[1] affirmed on other grounds, *Johnson v. United*

[1] While the *Johnson* case involved due process in the federal courts, rather than in the state courts as in the case at bar, the issue was due process of law, and as was said in the *Johnson* case,

States, 318 U.S. 189 (1943). In that case, a prosecution for violation of the Internal Revenue Laws, the trial court excluded the defendant from the courtroom during argument on the admissibility of evidence. The Court of Appeals held that this did not deny the defendant his right to due process.

> "The question which we have before us in the instant case is one which is extremely difficult to answer. Obviously it is not necessary for a defendant to be present at every stage of the proceedings against him. Due process does not require him to be in court when a true bill is returned against him by a grand jury or when his appeal is argued in the appellate court [citations]. The defendant must be in court when jurors are challenged [citations]. Certainly the defendant must be present when the jury is in the box and the trial is in progress. The defendant must be deemed to have the absolute right to hear everything which the jury hears if he is to protect himself. Under such circumstances his presence bears a relation 'reasonably substantial, to his opportunity to defend.' To exclude him from the court room upon such occasions would be to hazard his constitutional rights upon the theory an appellate tribunal might save him from jeopardy. He must be present when the jury is present and is receiving evidence. If he is, then the trial meets the substance of the stringent test laid down by Mr. Justice Roberts in his dissenting opinion in the Snyder case, 291 U.S. at page 129 . . . Mr. Justice Roberts stated that the prisoner's constitutional right of presence ". . . comprehend[s] the inquiry by the ordained trier of fact from beginning to end'. . . In the instant case it appears that the defendant was present at all times that the jury was present and his absolute constituitonal right of presence was not infringed." 129 F.2d 958, 959.

". . . the phrase 'due process of law' used in the Fourteenth Amendment to restrain action by the states means substantially the same as that phrase of the Fifth Amendment, restraining action by the federal government."

The only issue at the trial was whether, as a consequence of certain happenings some months previously, relator was guilty of murder, and if so in what degree. Whether or not defendant was physically and mentally competent during part of the trial was, of course, a vital matter, but it was not an issue for the determination of the jury, any more than would have been the possible incompetence of court or counsel at the trial. The court's comment immediately preceding the charge (quoted above) might well have been omitted, but the comment did not violate any of defendant's rights to due process.

Since the issue of relator's competence was not an issue for the jury, it did not constitute part of the trial, and it was not violative of due process for the court to hear the doctor's reports in relator's absence.

One important factor in addition is that defendant's counsel made no objection although they were present when the trial judge received the medical reports and had every opportunity to object to their receipt in the absence of defendant.

Inability to Receive
Effective Assistance of Counsel

Relator presented the testimony of himself, some of his relatives, a friend, and a fellow prisoner, which, if believed, would establish that during the trial he received surreptitiously and used a quantity of drugs, that he secreted them in his rectum and so was able to bring them into the prison undetected, that being in despair following the testimony of himself and his brother he attempted to commit suicide late Sunday night or early Monday morning by cutting his wrist and simultaneously taking the balance of the large quantity of drugs, that these drugs included seconal, nembutal, placidyl, and possibly butisol sodium, that the suicide attempt failed although he intended that it succeed, and that the effect of the drugs he took in the attempt, coupled with the thorazine given him

later, had the effect of dulling his senses of awareness of his surroundings so that there could not be reasonable communication between him and his counsel, with the end result that during the seventh and perhaps the eighth day of the trial he was unable to cooperate fully with, or to receive the effective assistance of, his counsel.

It is incredible that he could take this quantity of powerful drugs and live. I accept as credible the testimony of Dr. Keyes that the taking of all these drugs would probably have caused death, or at the least a profound coma for a protracted period. I do not believe that relator, his relatives, his friend, and his fellow prisoner told the truth about the drugs. I am impressed by relator's failure to produce his defense counsel to testify in this proceeding on the vital issue of his ability to communicate with them. I find that relator's apparent unconsciousness or inability to communicate at his trial was not real but was an intentional and deliberate effort on his part to convey a false impression. I find that he was conscious and able to communicate with his counsel during his entire trial.

The facts and law set forth in this proceeding constitute the court's findings of fact and conclusions of law.

ORDER

AND NOW, October 4, 1961, the petition for writ of habeas corpus is denied.

s ALLAN K. GRIM, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,924

UNITED STATES OF AMERICA
EX REL. HERMAN RUCKER,
Appellant
v.
DAVID M. MYERS, Warden, State Correctional Institution, Graterford, Pennsylvania.

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued October 18, 1962

Before: MCLAUGHLIN and HASTIE, *Circuit Judges;* and DUMBAULD, *District Judge.*

OPINION OF THE COURT

(Filed November 30, 1962)

By HASTIE, *Circuit Judge.*

This is an appeal by a Pennsylvania state prisoner, who is under sentence of death for first degree murder, from a United States District Court's denial of his petition for a writ of habeas corpus on a claim that the procedure at his trial deprived him of due process of law. The highest state court had rejected this claim. *Commonwealth v. Rucker*, 1961, 403 Pa. 262, 168 A.2d 732, *cert. denied*, 368 U.S. 868.

During appellant's trial and before his conviction, the jury was informed, over his objection, that he had previously been convicted of voluntary manslaughter and aggravated assault. The jury was instructed that it should consider these convictions only for the purpose of determining the penalty for first degree murder if and after the accused should be found guilty of that crime. Appellant contends that this introduction of his prior criminal record in evidence during the presentation of the prosecution's case in chief [1] was so lacking in justification and so prejudicial that it constituted a denial of due process of law. On October 10, 1962, in *United States ex rel. Scoleri v. Banmiller*, No. 13,834, — F.2d—, this court, sitting en banc, sustained a similar contention. Therefore, our first inquiry is whether this case differs in any significant way from *Scoleri*. [This case now reported at 311 F.2d 311]

The *Scoleri* case grew out of a homicide during the course of an armed robbery. The defense attempted to establish an alibi and to prove that the witnesses who placed the accused at the scene of the crime had mistaken another person of rather similar appearance for him. But when the jury retired to consider this evidence, there was also before it Scoleri's criminal record of twenty-five prior robbery convictions, which had been included in the government's case in chief. Although the jury had been instructed to consider this record only in determining the penalty for first degree murder and not on the question of guilt or innocence, this court concluded that such proof of a large number of previous robberies by the accused was "gravely prejudicial" on the controverted question of his participation in the instant robbery. And since this prej-

[1] This procedure, first sanctioned in *Commonwealth v. Parker*, 1928, 291 Pa. 111, 143 Atl. 904, was followed until the "Split-Verdict Act" of December 1, 1959, P.L. 1621, §1, 18 P.S. §4701 (Supp.). Under that statute such evidence is introduced only in a supplementary proceeding after conviction to determine the penalty for first degree murder. However, the new law had not become effective at the time of appellant's trial.

udice could have been avoided and the limited proper purpose of the evidence could as well have been accomplished by merely withholding the evidence of prior crimes until after guilt had been determined, a majority of this court held that due process of law had been denied. It was the essence of our holding that, in the circumstances of the *Scoleri* case, the introduction of evidence of prior crimes needlessly subjected the accused to "grave prejudice".

With this rationale of *Scoleri* in mind, we next consider the issues, and the evidence in the present case. This too was an indictment for murder alleged to have occurred during the commission of a robbery. The prosecution also undertook to show that the killing was willful and deliberate.

The victim was the wife of the proprietor of a small corner grocery store in Philadelphia. There was undisputed evidence that on December 13, 1958, the couple closed the store at 6:30 p.m. and retired to their adjoining living quarters. About 9 p.m. two men burst in upon them, savagely beat both of them, stabbed and killed the wife, took more than one hundred dollars from a drawer and from the cash register, and escaped. Within two hours a search of the immediate neighborhood resulted in the apprehension and arrest of the appellant and another man. Their clothing was stained with what was later identified as human blood of the same type as that of the deceased, and they had in their possession money and papers, which were later identified as proceeds of the robbery.

Appellant made a full confession within a few hours after his arrest and shortly thereafter he reenacted the crime at its scene. A court stenographer recorded the confession verbatim, and it was introduced into evidence at the trial. In his confession, he admitted breaking into the house for the purpose of robbery, beating and stabbing the deceased, accomplishing the robbery, and fleeing from the premises. The defense did not contend that the confession was coerced or that it was incorrect in any detail.

At appellant's trial the only defense attempted was a showing and argument, in mitigation that accused was a heavy drinker, that he was quarrelsome and bellicose when drinking, and that he had consumed considerable amounts of wine and whiskey shortly before setting out on his felonious enterprise. However, voluntary drunkeness was no defense at all in the circumstances of this case. On the clear and undisputed evidence, including appellant's ex-

The following accurate summary of the facts as established without contradiction in the trial record appears in the opinion of the Supreme Court of Pennsylvania on the present appellant's direct appeal from his conviction:

"On December 13, 1958, at approximately 9 p.m., defendant with one Carl Melton forced open the cellar door and entered the grocery store and dwelling of Samuel Schloss and Rose Schloss, his wife, which was located at 311 North Franklin Street, Philadelphia. Their principal objective was to rob the Schlosses, who were each 65 years of age. Melton grabbed Schloss and brutally and mercilessly beat him on his head with a hatchet and various large pieces of brass pipe, the blood was spattered on the floor, the walls and even the ceiling. Defendant went into another room, knocked Mrs. Schloss to the ground stamped several times on her face with his heel, beat her into unconsciousness and then stabbed her in several parts of her body with a long boning knife, which he left in her body. She died from the knife wounds. Without further detail it will suffice to say that it was one of the most brutal, vicious, merciless, unnecessary and inhuman killings ever committed. It was not only committed in the perpetration of a robbery, but it was also a willful, deliberate and premeditated murder. They then rifled the cash register and fled.

"An hour later that night defendant and Melton were arrested on the street a short distance from the Schloss home. There were blood stains on the arms and clothing of both men and they were caught with the 'fruits of the crime' (robbery). Defendant not only signed a voluntary detailed confession but also re-enacted the killing for the police. Defendant did not testify in his own defense. After a very able charge by the Court the jury convicted defendant of first degree murder with penalty of death." *Commonwealth v. Rucker*, 1961, 403 Pa. 262, 168 A. 2d 732.

plicit admission, this was a homicide committed during the commission of a felony. In accordance with Pennsylvania law the trial judge charged as follows:

> "Now, if you find that the defendant killed Rose Schloss in the perpetration of, or attempt to perpetrate, the felony of burglary or robbery, then the affirmative defense of intoxication would not be meaningful at all, because the specific intent to kill is not required under our statute to raise the crime to first degree murder under such circumstances."

Consistent with this charge, the jury could not properly have used the evidence of intoxication as a basis for finding the accused guilty of an offense less serious than first degree murder. Moreover, since appellant's drunkenness was voluntary, and his detailed confession and reconstruction of the crime demonstrated his awareness of what he was doing, the jury could not reasonably have avoided the conclusion that the accused was responsible for his conduct.

More generally, the evidence was clear, overwhelming and uncontroverted on every point essential to the proof of first degree murder. There was neither a significant conflict in the evidence nor a doubtful issue of fact in connection with which the jury's awareness of the defendant's prior conviction of voluntary manslaughter and aggravated assault could have been prejudicial. Indeed, a reading of the record makes it very clear that the only real question was whether death or a lesser penalty should be imposed as punishment for the felony-murder to which the accused had confessed. That, of course, is the very purpose for which the jury could properly consider the evidence of prior crime.

We recognize that there are some situations in which the procedure in a criminal investigation or prosecution has been so shocking and outrageous that a conviction will be vacated even though actual prejudice to the accused has not been proved. The use of torture or the imposition of

gross indignity during the investigation of crime is such an intolerable procedure. *Brown v. Mississippi*, 1936, 297 U.S. 278; *Rochim v. California*, 1952, 342 U.S. 165. So is the willful employment of perjured testimony or the deliberate suppression of evidence favorable to the accused. *Pyle v. Kansas*, 1942, 317 U.S. 213. In such cases the reprehensible character of the behavior of the representatives of the state is decisive without regard to any question of its effect upon the outcome of a trial.

But we are not dealing here with official conduct which is grossly wrong, regardless of any prejudicial effect upon the trial of the accused. Courts, including our own, repeatedly sanction the admission of evidence for one purpose with a cautionary instruction that it may not be used for any other. *E.g., United States v. Laurelli*, 3d Cir. 1961, 293 F.2d 830, *cert. denied*, 1962, 368 U.S. 961. *United States v. Stirone*, 3d Cir. 1958, 262 F.2d 571, *rev'd on other grounds*, 1960, 361 U.S. 212. In this very case, if the accused had testified in his own defense, evidence of prior crimes would have been admissible with an instruction that it be considered for the limited purpose of attacking his credibility. *Commonwealth v. Quaranta*, 1928, 295 Pa. 264, 145 Atl. 89. Courts frequently deplore such procedure. Judge Learned Hand has described it as "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." See *Nash v. United States*, 2d Cir. 1932, 54 F.2d 1006, 1007, *cert. denied*, 285 U.S. 556. But, the procedure is interdicted "only in the clearest cases of gross and easily avoided prejudice" to some party. See *Torrance v. Salzinger*, 3d Cir. 1962, 297 F. 2d 902, 905, *cert. denied*, 369 U.S. 887. Accord *United States v. Jacangelo*, 3d Cir. 1960, 281 F.2d 574. Difference of judgment as to the likelihood of such prejudice seems to have caused the division of the Supreme Court in *Delli Paoli v. United States*, 1957, 352 U.S. 232.

We have already demonstrated that the present record, unlike the *Scoleri* record, provides no basis for appre-

hension that the jury determination of guilt may have been unfairly influenced by the evidence of prior crimes. Therefore, we conclude that no such denial of due process of law as was found in *Scoleri* has been established here.

The judgment will be affirmed.

McLAUGHLIN, Circuit Judge, dissenting.

Once the true, undisputed factual situation here is squarely faced, the issue is simple.

There was no defense evidence that the defendant had not committed the homicide. Nothing to cause the jury to doubt this. No pretension that the defendant was somewhere else when the crime was perpetrated or that some other person of "rather similar appearance" to him was responsible. As the majority opinion states: "At appellant's trial the only defense attempted was a showing and argument in mitigation that accused was a heavy drinker, that he was quarrelsome and bellicose when drinking, and that he had consumed considerable amounts of wine and whiskey shortly before setting out on his felonious enterprise."

That defense was not directed at acquittal of the charge of first degree murder. Under the Pennsylvania law drunkenness is no defense to a felony killing. So what was sought was not an unlawful reduction of the crime of felony murder to some lesser offense (which could not have been accomplished under the charge) but for the jury to exercise its prerogative, under the evidence and in accordance with the charge, to make the sentence life imprisonment instead of death.

The trial court did charge if this was a felony homicide "then the affirmative defense of intoxication would not be meaningful at all, because the specific intent to kill is not required under our statute to raise the crime to first degree murder under such circumstances." That went directly to the conviction of first degree murder. As to the penalty, the judge properly told the jury:

"If the defendant fails to prove the defense of intoxication to the satisfaction of the jury, this defense is not valueless. It does not deprive him of the benefit of whatever evidence is in the case on that subject when considered in connection with any other evidence in the case which might guide you as to the proper penalty in the event that you find the defendant guilty of murder in the first degree. Again I remind you, members of the jury, that my recollection of the evidence is that there is very little, if any, evidence of intoxication. However, you are the fact finding body and it is your recollection, and your recollection alone, which governs and controls."

That "affirmative defense of intoxication" was therefore before the jury on the one controverted issue of the trial, the question of whether the jury would sentence the defendant to die or to imprisonment for life. There was nothing collateral about that problem. And nothing collateral about the defense effort to satisfy the jury that Rucker was a heavy drinker through the years and was drunk at the time of the crime. The only fair inference from the testimony of his unfortunate sister was that Rucker, since his return from three or four years of combat service under General Patton, was a nervous, quarrelsome alcoholic who even fought with her and his brothers when he was drunk and because he was drunk. Quite a point is made by the majority with reference to Rucker's "voluntary drunkenness". It is not needed now but at any new trial it should be thoroughly established that an alcoholic's drunkenness is not, generally speaking, voluntary but compulsive. Entirely aside from that, the trial jury had before it the miserable and pitiful deterioration of Rucker since the last war and the contention that he was intoxicated at the time of the slaying. Argued strongly to the jury, as this life or death proposition should have been and undoubtedly was, no one can reasonably say that the jury's verdict of guilty of first degree murder would not have

fixed the penalty at life imprisonment. And no one, once the significance of the above simple facts is understood, can reasonably say that putting before the jury when it was making its most serious choice, the prisoner's past criminal record, did not substantially prejudice Rucker on the single real question before it. Until then, Rucker, justifiably, had an excellent chance of life imprisonment. That chance was destroyed by the jury being told that he had previously been indicted for murder, under which he had pleaded guilty to voluntary manslaughter and that he had also been tried and found guilty of trying to kill somebody else.

It is heartening to note that the majority opinion does not pretend that the introduction of Rucker's past crimes did not weigh heavily against him when the jury considered what his sentence should be. As Chief Justice Jones said in his dissent in Commonwealth v. DePofi, 362 Pa. 229, 251 (1949), "The thing could, and no doubt has, actually worked out in practice in a truly shocking way."

Basically this appeal is not concerned with the conviction for first degree murder. The drunkenness did not vitiate the degree of the particular crime. It did heavily affect the punishment for that crime. Ignoring that, as the majority does, will not resolve the injustice of the way the death penalty was assured. The difference between living and dying even for a Rucker, cannot be properly designated as "immaterial". Rucker was grievously harmed by that evidence.

The exercise, attempted in the majority opinion, of compartmentalizing Scoleri does not come off successfully, because we are dealing with the penalty branch of the verdict, not the conviction itself as in Scoleri. The majority's interpretation of the principle of the Scoleri decision is that *serious* prejudice to a defendant resulting from the presentation to the jury of his criminal record must result in reversal. That construction is open to serious doubt. Indeed, it is not easy to accept the complacent assumption that the admission of his prior crimes record could be non-prejudicial

to a defendant under any circumstances. However, that impressive argument also need not be followed through at this stage of these proceedings since the prejudice to Rucker as to the sentence imposed was overwhelming. Let no one be confused by the endeavor to appraise the amount of prejudice to him with respect to the killing of the victim. There was no defense to that. The glaring wrong before us in this appeal affected the penalty; if upheld it sends Rucker to the electric chair. Scoleri had a defense on the merits which was damaged by his record being given the jury. We do not touch the problem of how badly the revelation of Rucker's previous convictions hurt him with the jury as to the offense itself. That is not our current controversy. We are concerned exclusively with the penalty inflicted. The majority opinion does not even tangentially come to grips with that one part of the jury verdict which is flagrantly wrong and which calls for a reversal of the judgment of conviction.

APPENDIX "C"

DECISION OF THE COURT OF APPEALS

"The judgment of the Court below will be reversed with direction to grant the writ of habeas corpus." (Appendix B. p. 39).